SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 47

JAY GIACCIO, APPELLANT,

vs.

PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, EASTERN DISTRICT

INDEX

RECORD PRESS, PRINTERS, NEW YORK, N. Y., JULY 27, 1965

[fol. 1] [File endorsement omitted]

[fol. 2]

IN THE SUPERIOR COURT OF PENNSYLVANIA

PHILADELPHIA DISTRICT

Court of Quarter Sessions of the County of Chester

September Sessions, 1961—No. 225-226

COMMONWEALTH OF PENNSYLVANIA, Appellant,

vs.

JAY GIACCIO.

No. 123—October Term, 1963

APPEAL AND AFFIDAVIT—Filed February 26, 1963

Enter Appeal on behalf of the Commonwealth of Pennsylvania from the judgment of the Court of Quarter Sessions of the County of Chester.

/s/ SAMUEL J. HALPREN
Samuel J. Halpren, Dist. Atty., D. A. Office, Court House Annex, West Chester, Attorney for Appellant.

(Please print name and address under signature)

Send All Notices To: (Attorney for Appellant) Samuel J. Halpren, Esq. (Address) D. A. Office, Court House Annex, West Chester, Pa.

To Prothonotary,

Superior Court—Philadelphia District
County of Phila., ss:

Samuel J. Halpren being duly sworn saith that said Appeal is not taken for the purpose of delay, but because ap-

pellant believes he has suffered injustice by the
from which he appeal

Samuel J. Halpren

Sworn to and subscribed this 26th day of Feb. A. D. 1963.

George W. Dunn, Jr., Dep. Pro.

No. 123 October Term, 1963
Returnable 1st Monday of April, 1963
List for June 10, 1963 at Phila.

[fol. 3]

IN THE SUPERIOR COURT OF PENNSYLVANIA

123 October Term, 1963

DOCKET ENTRIES

COMMONWEALTH OF PENNSYLVANIA, Appellant

v.

JAY GIACCIO

CRIMINAL CASE

$12.00

For Appellant:

Samuel J. Halpren
Dist. Atty.
Dist. Atty's Office
Court House Annex
West Chester, Pa.

John S. Halsted,
Asst. Dist. Atty.
14 N. High Street
West Chester, Pa.

For Appellee:

* James C. N. Paul
* Peter Hearn
123 S. Broad Street
Phila. 9, Pa.

	Appeal from the Judgment of the Court of Quarter Sessions, of the County of Chester, at No. 225-226 September Sessions, 1961.
February 26, 1963.	Appeal and Affidavit filed and Writ exit, returnable the First Monday of April, 1963, listed for argument at the session commencing June 10, 1963.
March 5, 1963.	Record filed.
March 8, 1963.	Notice of Appeal filed.
May 23, 1963.	Appearance of John S. Halsted, Assistant District Attorney, for Appellant, filed.
May 23, 1963.	Petition of Appellant for Continuance to the September, 1963 Session, at Philadelphia, with Joinder, filed.

ORDER

And Now, May 24, 1963, upon consideration of the within petition for continuance of argument of appeal No. 123, October Term, 1963, argument of said appeal is continued to the Philadelphia session beginning the second Monday of September, 1963.

By the Court,

Chester H. Rhodes,
P.J.

May 24, 1963	Continued to the September 1963 Session at Philadelphia
September 10, 1963	Argued (7)
	DECISION
December 12, 1963	Order Reversed, Sentence Reinstated. Woodside, J. Flood, J. Files a Dissenting Opinion.
December 24, 1963	REMITTED
December 20, 1963	Petition for Allowance of Appeal filed in Supreme Court at No. 240 Allocatur Docket No. 4. (Received after Remittitur sent out)
February 3, 1964	Petition Allowed and Appeal Granted to No. 218 January Term, 1964
February 5, 1964.	Supplemental Writ of Certiorari Exit.
February 7, 1964	Record certified to Supreme Court to No. 218 January Term, 1964
February 7, 1964.	Record filed.

[fol. 14]

No. 218—January Term, 1964

In the Supreme Court of Pennsylvania

For the Eastern District

Commonwealth of Pennsylvania

v.

Jay Giaccio, Appellant.

* * * * * * *

Supplemental Record for Appellant

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA—
Filed December 12, 1963

Opinion by WOODSIDE, J.

This is an appeal by the Commonwealth from an order of the Court of Quarter Sessions of Chester County vacating a sentence to pay the costs of a criminal prosecution. The sentence had been imposed upon a defendant after a jury had found him not guilty of the misdemeanor with which he was charged, but had directed him to pay the costs of prosecution.

The defendant was charged with wantonly pointing and discharging a firearm in violation of The Penal Code of June 24, 1939, P. L. 872, § 716, 18 P. S. § 4716.

The legislature has provided for the disposition of costs in misdemeanor cases by providing, inter alia, that " . . . in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; . . . " Act of March 31, 1860, P. L. 427, 445, § 62, 19 P. S. § 1222. This was a reenactment of a substantially similar provision contained in the Act of December 7, 1804, 4 Smith's Laws 204, which was a temporary act, "continued and made perpetual" [fol. 15] by an act passed March 29, 1809, 5 Smith's Laws 48. Thus, the statutory law of this Commonwealth has permitted the imposition of costs upon acquitted defendants for over a century and a half.

The court below found that the above provision of the Act of 1860 permitting the imposition of costs upon an acquitted defendant was unconstitutional for a variety of reasons. The court in its opinion suggested that the statutory provision is unconstitutionally vague; that it is an unconstitutional delegation of legislative power; that it violates the

doctrine of fundamental fairness; that it affords no hearing; that it is a denial of the equal protection of the law; that it does not require proof beyond a reasonable doubt; that it provides for an unreasonable classification; and that it is an instrument of oppressive cruelty. To our knowledge, no court has ever found a Pennsylvania statute in such flagrant violation of the Constitution. If the statute were so flagrantly unconstitutional, it would indeed be a sad commentary upon the scores of appellate court judges who have examined the provision and the hundreds of trial judges who have applied it without seeing in it any of the infirmities conceived by the court below.

The validity of a statute imposing costs upon an acquitted defendant was before the Supreme Court in Commonwealth v. Tilghman, 4 S. & R. 127 (1818), where Mr. Justice Gibson prophesied that the provision in the Act of 1804 would "prove highly beneficial" even though it, "at first view, may appear unjust." One hundred thirteen years later Judge Keller, speaking for this Court, said of the provision imposing costs upon acquitted defendants, "However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of this Commonwealth and it [fol. 16] works substantial justice." Commonwealth v. Cohen, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931).[1] Between these two decisions the statutory provision here questioned was examined by the appellate courts, and its use approved many times: Harger v. Commissioners of Washington Co., 12 Pa. 251 (1849); Baldwin v. Commonwealth, 26 Pa. 171 (1856); Commonwealth v. Keenan, 67 Pa. 203, 207, 208 (1871); Linn v. Commonwealth, 96 Pa. 285 (1881). In Commonwealth v. Tremeloni, 93 Pa. Superior Ct. 432 (1927) this Court reversed the court below which had set aside the costs imposed upon a defendant by a jury.

In addition to the above cases which affirmed the imposition of costs upon acquitted defendants, other appellate

[1] Few students of Pennsylvania courts would fail to include Chief Justice Gibson and President Judge Keller among the greatest half dozen appellate court judges of this Commonwealth.

court cases have recognized the legality of the provision. For examples see, County of Wayne v. Commonwealth, 26 Pa. 154 (1856); Commonwealth v. Kocher, 23 Pa. Superior Ct. 65 (1903); Berks County v. Pile, 18 Pa. 493 (1852). The provision here questioned was examined and applied in scores of lower court cases, including Commonwealth v. King, —— D. & C. 2d ——, decided this year.[2]

Our Supreme Court has passed upon the constitutionality of the provision of the Act of 1860 imposing costs upon an acquitted defendant. In Wright v. Commonwealth, 77 Pa. 470 (1875)[3] the appellant, who had been acquitted of a misdemeanor but sentenced to pay the costs, contended that § 62 [fol. 17] of the Act of March 31, 1860, P. L. 427, 445, supra, was unconstitutional. The Supreme Court rejected the contention and affirmed the sentence imposing the costs upon the defendant. In the argument before us it was suggested that cases decided prior to the 14th Amendment to the Federal Constitution and prior to the adoption of our Constitution of 1874 are of little authority in presently considering the constitutionality of the statutory provision here being attacked. The argument is not pertinent for our Supreme Court has upheld the constitutionality of the questioned statutory provision *after* the adoption of Pennsylvania's present constitution and *after* the adoption of the 14th Amendment to the Federal Constitution.

The Supreme Court has sustained the validity of the Act of 1804 and the Act of 1860. When the validity of a statute is attacked and a decision rendered sustaining it, there is a presumption that all existing reasons for declaring the act unconstitutional were considered and deemed in-

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[2] The opinion in this case was written by President Judge J. Frank Graff, one of the most revered trial judges of this Commonwealth with over 39 years judicial experience, specially presiding in Alleghany County and sitting with two other able and experienced trial judges, Judges Samuel Weiss and Lloyd Weaver. The defendant's brief on the question of costs filed in that case appears to be identical with the defendant's brief filed with us.

[3] No reference to this case is made in the opinion of the court below or in the briefs of the parties.

sufficient. Keator v. Lackawanna County, 292 Pa. 269, 272, 141 A. 37 (1928); Dole v. Philadelphia, 337 Pa. 375, 379, 11 A. 2d 163 (1940); Nester Appeal, 187 Pa. Superior Ct. 313, 319, 144 A. 2d 623 (1958).

As the Supreme Court has twice passed upon the constitutionality of the very provision here questioned, the court below and this Court have no standing to overrule that Court's holding. Ordinarily, we would rest our decision on Wright v. Commonwealth, supra, without further comment. However, the appellee has suggested that "no one has heretofore challenged the constitutionality under present day constitutional concepts of Pa. Stat. Ann. tit. 19 § 1222." Of course, the constitutionality of the provision *has* been challenged and its validity upheld by the Supreme Court of Pennsylvania, so we must assume that counsel is asking us [fol. 18] to apply to the statute a new test based upon "present day constitutional concepts," which, he says, "accord a fuller measure of protection to accused persons." It is not clear to what extent this Court is being asked to ignore existing decisions of our Commonwealth's highest court, but it is clear that counsel is suggesting that the legislature has less power to deal with matters of this nature today than it did when "old" concepts of the constitution existed. But, consider what one of the most distinguished proponents of the "present-day concept" said *this year* on the question of declaring unconstitutional a state act which made it a misdemeanor to carry on a business theretofore considered to be legal. Mr. Justice Black, in speaking for at least eight members of the Supreme Court of the United States, said that that Court has "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U. S. 726, 730, 83 S. Ct. 1028 (1963). An examination of 7 P. L. E. Constitutional Law § 17 and cases there cited will demonstrate how far our own courts have gone in applying this rule.

The defendant in this case has a heavy burden to set aside the verdict of his peers based upon a statute of the legislature. As stated by Mr. Justice Cohen in the case of

Realty Corp. v. Philadelphia, 390 Pa. 197, 205, 134 A. 2d 878 (1957), "No act or portion thereof should be declared unconstitutional unless 'it violates the Constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation in our minds.' Kelley v. Baldwin, 319 Pa. 53, 54, 179 A. 736 (1935); Soblosky v. Messner, 372 Pa. 47, 59, 92 A. 2d 411 (1952)." "The burden of proof is upon the one who claims that the statute is unconstitutional." Common- [fol. 19] wealth v. Bristow, 185 Pa. Superior Ct. 448, 458, 138 A. 2d 156 (1958).

We know of no Pennsylvania statute whose validity has been attacked after so many years of constant application. Since the Act of 1804, two new constitutions have been adopted and scores of amendments have been made to the present constitution.[4] There have been over a hundred regular sessions of the legislature and a score of special sessions since the Act of 1804 was enacted. Hundreds of judges have examined and passed upon the statutory provision here questioned. As stated by Mr. Justice Agnew, and repeated by the Supreme Court in Booth & Flinn, Ltd. v. Miller, 237 Pa. 297, 306, 85 A. 457 (1912) concerning a somewhat similar situation, "The continued exercise of the power . . . cannot be accounted for except on the ground that all men, learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it."

A construction of the constitution adopted and acted upon by the legislature and acquiesced in by the people for many years is entitled to great weight. Summit Hill Borough, 240

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[4] The appellee argues that we should declare the questioned provision unconstitutional because the constitutions of a few other states prohibit the practice. If the statute were unconstitutional in the manner appellee suggests these states would not need a specific constitutional prohibition. The fact that our constitution, twice rewritten and frequently amended, does not prohibit the imposition of costs is a strong argument that the people of this Commonwealth have joined with their legislature and their courts in approving the practice.

Pa. 396, 399, 87 A. 857 (1913); 7 P. L. E. Constitutional Law § 12. It is true that mere passage of time does not give validity to an unchallenged statute, but the fact that a statute has been in effect for many years, even when unchallenged, is a strong argument in favor of validity. James v. Public Service Commission, 116 Pa. Superior Ct. 577, [fol. 20] 177 A. 343 (1935) 7 P. L. E. Constitutional Law § 20. The provision questioned here has not only been in existence since the earliest days of our Commonwealth but it has been twice challenged and its validity sustained.

The questioned provision of the Act of 1860 has been equated in the opinion of the court below and throughout the brief of the appellee with the practice which this Court condemned in Commonwealth v. Franklin, 172 Pa. Superior Ct. 152, 92 A. 2d 272 (1952). Prior to the decision in the Franklin case, which held the practice unconstitutional, certain judges, almost exclusively in Philadelphia, frequently held a defendant in bail to keep the peace after he had been acquitted by a jury. Few of the defendants thus held could raise the bail, and as a result they spent months and often years in jail. From 1939 to 1949, 478 acquitted defendants in Philadelphia served a total of over 600 years in prison, an average of well over a year each. The practice was unknown to most of the areas of the Commonwealth, and generally shocked "up state" judges who encountered it in Philadelphia.

There is no comparison between the statutory provision here questioned and the practice condemned in the Franklin case. Here the General Assembly of Pennsylvania thrice authorized the imposition of costs by a jury upon defendants found not guilty; the practice condemned in the Franklin case was not based upon an act of our legislature, but was a procedure adopted by the courts from an English Statute, 34 Edw. III c 1, enacted in 1360. Here a jury composed of the defendant's peers directed the imposition of the costs; the practice condemned in the Franklin case flouted the findings made by a jury of the defendant's peers. Here the purpose and usual effect of the procedure is limited to the recovery of expenses for which the defendant's con-

[fol. 21] duct was at least partially responsible; the practice in the Franklin case and its practical effect was to commit acquitted defendants to jail for long periods of time. Here the appellate courts of this Commonwealth considered and approved the practice in numerous cases; the Franklin case was the first, at least since the 14th Amendment to the Federal Constitution, to examine the constitutionality of a practice which had never been specifically sanctioned by our legislature.

Counsel for the appellee with light regard for the legislature and the courts suggests that the words "or the defendant" were inserted in the Act of 1804 "either by mistake or without clear recognition of their ramifications";[5] that in 1860 the legislature inserted the provision "without consideration of its merits";[6] that Mr. Justice Gibson was not familiar with the common law of Pennsylvania on imposition of costs when he wrote about it in 1818, that he misled subsequent judges and textbook writers, and that the imposition of costs upon acquitted defendants was unknown except in Pennsylvania.[7] As we view this case, the common

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[5] He ignores that the identical provision was examined by the legislature of 1809 which decided that it should be continued and made perpetual.

[6] In 1949 a legislative Committee on Penal Laws and Criminal Procedure of the Joint State Government Commission, after careful consideration of the then existing laws governing procedures in criminal matters, retained the provision here under review in its proposed recodification. See Senate Bill 988, 1949 Session, § 1601. Serving on that committee as legislators were five present members of the judiciary: Judges Lord, Brown, Rahauser, Readinger, and Woodring.

[7] On the early law of this Commonwealth on this point see Commonwealth v. Tilghman, supra, 4 S. & R. 127 (1818); Berks County v. Pile, supra, 18 Pa. 493, 496 (1852); Long v. Lancaster County, 16 Pa. Superior Ct. 413, 417 (1901); Commonwealth v. Kocher, supra, 23 Pa. Superior Ct. 65, 67, 68 (1903); Kessler on Criminal Procedure in Pennsylvania, Vol. 1, page 235, and cases there cited. On whether this provision has been unique to Pennsylvania see: State v. Butcher, 1 Del. Cases 334 (1793); State v. Miller, 1 Del. Cases 512 (1814); Delaware Constitution of 1792, Art. VIII, § 8; Keither v. State, 27 Ga. 483 (1859); State v. Hargate, 1 N. C. 196 (1800).

law relating to costs prior to 1804 is no longer important. [fol. 22] If other states have different ideas on the disposition of costs in misdemeanor cases, that is an argument to be addressed to the legislature and not the courts. The argument that the legislatures of 1804, 1809 and 1860 did not know what they were doing deserves no reply.

We cannot follow the defendant's argument that the questioned statutory provision constitutes an unlawful delegation of legislative power. It is obvious that in authorizing the disposition of costs, the legislature has not delegated the power to the jury to make a law, but only the power to determine some fact or state of things upon which the law makes its action depend. This it may do. Locke's Appeal, 72 Pa. 491, 498 (1873); Nester Appeal, supra, 187 Pa. Superior Ct. 313, 316, 144 A. 2d 623 (1958). It is not an exercise of a legislative power by the judiciary for it, through a jury, to dispose of the costs in accordance with a statutory provision, but it would be an unconstitutional assumption of a legislative power by the judiciary were the courts to ignore the statute and dispose of costs contrary to its provisions.

The defendant contends that it is an unconstitutional classification to separate the crimes into summary convictions, misdemeanors and felonies for the purpose of determining in which cases the costs may be placed upon defendants and in which cases they may not be placed upon them. The separation of crimes into these classes and the application of different rules to the different classes has been so uniformly recognized and so firmly established in our law that the validity of legislation dealing with these classes separately need no longer be examined. Although the classification of particular crimes by the legislature may not always appear consistent, the separation of crimes into these classes and the application of different rules to each [fol. 23] class is a matter for the legislature and its exercise of that power in separating crimes for the payment of costs is not a violation of the constitution. A classification may be discriminatory and not unconstitutional if any state of facts can be conceived that would sustain it. Jones &

Laughlin Tax Assessment Case, 405 Pa. 421, 436, 175 A. 2d 856 (1961).

Contrary to the defendant's contention, the statutory provision here questioned meets the requirements of the due process clause of Art. 1, § 9 of the Constitution of this Commonwealth and the 14th Amendment to the Constitution of the United States. The defendant in a criminal case is presumed, as all of us are, to know the law. Thus, when brought to trial on an indictment charging a misdemeanor, the defendant has notice that the jury may impose the costs of prosecution upon him even if he is acquitted. He has an opportunity to be heard on the question of costs. The decision of the jury is based upon evidence heard by it. The defendant has a right to question the charge of the court on the question of costs. He has the right to subsequently challenge the amount of the costs taxed, and to challenge any arbitrary verdict by the jury in imposing the costs upon him.

The defendant assumes that the imposition of costs under the Act of 1860, supra, is the infliction of punishment upon a person for undefined conduct. The imposition of costs on either the prosecutor or defendant is not punishment for the commission of a crime. Imposition of costs does not form a part of the penalty of even guilty defendants. Commonwealth v. Soudani, 193 Pa. Superior Ct. 353, 356, 165 A. 2d 709 (1960); Commonwealth v. Cauffiel, 97 Pa. Superior Ct. 202, 205 (1929); Commonwealth v. Moore, 172 Pa. Superior Ct. 27, 29, 92 A. 2d 238 (1952). It is true that a person sentenced to pay the costs in a criminal case may be [fol. 24] committed to prison for refusing to pay them. But if he is unable to pay the costs, he may be exonerated from paying them by proceeding under the insolvency act. This procedure is available to him not only after he has been committed to prison for failure to pay the costs, but also before he is committed. Thus, an acquitted defendant upon whom costs have been imposed may be discharged from paying them without having to undergo any actual imprisonment. Kishbaugh's Petition, 135 Pa. 468, 19 A. 1063 (1890); In re: Collection of Fines, Cost, etc. 76 Pa. D. & C. 456, 469, 471 (1950).

The costs of a case do not always fall upon the unsuccessful party. There are situations in divorce cases, support cases, equity cases and orphans' court cases where costs, in whole or in part, may be imposed upon the party successful in the action.

There are many crimes made punishable by the legislature which have never been defined by it. The legislature looks to the common law, i.e., court decisions, to define many serious offenses for which it provides punishment. The Act of 1860, supra, is as specific as any statute can be concerning the right of the jury to dispose of costs in a misdemeanor case, the manner in which the jury may divide the costs and the parties upon whom it may impose the costs. Of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury. The imposition of costs other than upon the county must be based upon conduct by either the prosecutor or the defendant or both which is related to the case. It is not necessary, indeed it would be impossible, for the legislature to detail all the circumstances and conditions under which the jury should or should not impose the costs [fol. 25] upon the parties. The legislature need not set forth with the same particularity the circumstances under which a jury, under the control of the court, may exercise the power given to it, as it must set forth the area within which a governmental board or commission must act. Nester Appeal, supra, 187 Pa. Superior Ct. 313, 320, 144 A. 2d 623 (1958).

The statute itself does not produce unconstitutional unfairness. Should the verdict in a particular case be arbitrary or should there be a gross abuse of discretion in the imposition of the costs upon either the prosecutor or the defendant, the court has the power to relieve the party from such arbitrary or unjust verdict. Commonwealth v. Cohen, supra, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931); Dunn Appeal, 191 Pa. Superior Ct. 346, 349, 156 A. 2d 349 (1959). The public is frequently put to the cost of trying a defendant because of reprehensible conduct by him. When the

jury is warranted by the evidence and authorized by the legislature to collect these costs from such defendants there is no reason why the will of the legislature and the jury should be set aside when it is not arbitrary or unwarranted under the evidence.

Those who think it is inconsistent and basically unfair to place the costs upon acquitted defendants insist upon cataloguing all conduct as either wholly right or wholly wrong. But most human conduct does not fit into these absolutes. Any effort to show life in black and white, without gray, fails to accurately portray the truth. Judges, jurors, and legislators for over a century and a half have recognized the "substantial justice" of this provision for the simple reason that in practice it produces results that are fair and just.

There are endless situations in which the jury might find that the defendant's improper conduct was responsible for [fol. 26] the prosecution even though he was not guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fist fight were guilty of conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs; or where the defendant in a "drunken driving" case drank and then drove while in that twilight zone that exists at some stage of the drinking; or where defendants charged with adultery registered at a hotel as husband and wife but convinced the jury that they had not actually committed adultery. As stated in Commonwealth v. Franklin, supra, 172 Pa. Superior Ct. 152, 193, 92 A. 2d 272 (1952), "A most important portion of the administration of our system of criminal justice is the fact that the jury in subtle ways may temper the rigidity of our criminal code in the application of the letter of the law to particular cases and may perhaps thereby mitigate the rigors of the law."

If the test of constitutionality is to be based solely upon a concern for the accused, that concern may not be well

placed, for there are undoubtedly many cases where a verdict of "not guilty but pay the costs," would have been a verdict of guilty had there been no compromise position for the jury to take. See discussion by Judge Burton R. Laub of Erie County in his Pennsylvania Trial Guide § 171.

The defendant in this case was charged with violation of The Penal Code of June 24, 1939, P. L. 872, § 716, 18 P. S. § 4716, supra, which provides that "Whoever playfully or [fol. 27] wantonly points or discharges a gun, pistol or other firearm at any other person, is guilty of a misdemeanor . . . " From the part of the record before us, it appears that a woman, her child and her dog were visiting next door to the defendant. The dog started toward the defendant's property, the child followed it, and the mother pursued both of them to keep them from the defendant's property. The defendant presumably seeing the child coming toward his property rushed from his home with a pistol and fired it in the direction of the people, all of whom remained on the neighbor's property. Whether or not this conduct constitutes a violation of § 716 is not before us. The jury acquitted the defendant apparently believing that the defendant had fired a blank from a starting revolver which was not aimed directly at the people in the neighbor's yard. The people in whose direction the defendant fired had no way of telling whether he was shooting blanks or just failing in an attempt to hit them. The conduct of the defendant was improper and such as to warrant bringing the prosecution. He was fortunate to have been acquitted, but substantial justice was done to all concerned by the imposition of the costs upon him.

The statutory provision here attacked has thrice been enacted by the legislature; it has twice been held constitutional by the Supreme Court; it has been examined, tested, construed and applied for a century and a half; it is believed by many able trial and appellate court judges to do substantial justice; it constitutes a practical and realistic answer to the problem of costs. We can find no reason that would justify our holding it unconstitutional.

Order reversed, sentence reinstated.

Flood, J. files a dissenting opinion.

[fol. 28]

DISSENTING OPINION BY FLOOD, J.

Section 62 of the Act of March 31, 1860, P. L. 427, 19 PS § 1222, insofar as it authorizes the jury to impose costs upon an acquitted defendant and subjects him to commitment to jail upon failure to pay them, is a penal statute. Yet it does not say what conduct shall subject the acquitted defendant to this penalty. Consequently, when the jury determines that an acquitted defendant shall pay the costs and the court proceeds, in accordance with the statute "forthwith" to "pass sentence to that effect and order him to be committed to the jail of the county until the costs are paid, unless he give security . . ." there is a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States and Art. I, § 9, of the Constitution of Pennsylvania. *Chester v. Elam*, 408 Pa. 350, 184 A. 2d 257 (1962).

The statute before us is a penal statute. It was so denominated by Mr. Justice Gibson in *Commonwealth v. Tilghman*, 4 S. & R. 127 (1818) in considering the Act of 1804, of which § 62 of the Act of 1860 is a faithful and literal reproduction. "I grant, that a statute imposing costs, is penal in its nature and must be construed strictly . . . ." This is the language of Gibson, J., in the opinion in the *Tilghman* case which is relied upon, mediately or immediately, by all the subsequent cases holding these two acts valid. In a later case, the Supreme Court said: "The statute which enables a grand or petit jury to punish with costs is penal, and to be strictly construed." *Clemens v. The Commonwealth*, 7 Watts 485 (1838).

It is a penal statute because under it costs can be imposed only upon a defendant who has been indicted.

[fol. 29] It is penal in that it may result in a jail commitment, such commitment being mandatory under the statute if the acquitted defendant does not pay the costs at once or give security to pay them within ten days. In this it is unlike statutes imposing costs in civil cases, such costs, in

the absence of fraud, being enforceable only by execution against property. *S. S. Pierce's Appeal,* 103 Pa. 27 (1883).

The legislature which adopted it evidently considered it penal because it was enacted as part of an act entitled "An Act to Consolidate, Revise and Amend the Laws of this Commonwealth relating to Penal Proceedings and Pleadings."

Nor is the conclusion that this statute is penal in any way weakened by the fact that the imposition of costs, following a judgment of conviction, not acquittal, has been held for some purposes to be an incident of the judgment, rather than punishment for the crime. This apparently stems from *Commonwealth v. Dunleavy,* 16 Pa. Superior Ct. 380 (1901), which held that a suspended sentence on condition that costs be paid was not a sentence so as to destroy the court's power later to revoke the suspension and impose a prison sentence. Cases like *Commonwealth v. Soudani,* 193 Pa. Superior Ct. 356, 165 A. 2d 90 (1960), holding the costs following a conviction are not part of the sentence, but are an incident of the judgment, cannot apply to defendants found not guilty. Costs on the defendant cannot possibly be "incident" to a judgment following a not guilty verdict. The statute provides that when the jury shall upon acquittal determine that the prosecutor or the defendant shall pay the costs, "the court shall forthwith pass *sentence* to that effect." The sentence as to an acquitted defendant can only be that he pay the costs. This is the actual judgment and not an incident to the judg-
[fol. 30] ment. The cases holding that the imposition of costs is an incident to a judgment of sentence upon a guilty verdict lend no support to the proposition that the imposition of costs on an acquitted defendant is something other than punishment.

It is to be noted that even in civil cases the Supreme Court said, again speaking through Gibson, J.: "At common law, there were no costs expressly by name, but the plaintiff, where he failed, was punished in amercement *pro falso clamore,* and the defendant, where the judgment was against him in *misericordia cum expensis litis,* for his un-

just detention of the plaintiff's right; and this was the foundation of the statutes which afterwards gave costs by name; so that costs, in their origin, were rather a punishment of the party paying, than a recompense to the party receiving them." *Musser v. Good,* 11 S. & R. 247, 250 (1824).

No amount of dialectic can alter the fact that this statute provides that an accused may go to jail without having been convicted of any crime—indeed after having been acquitted of the only crime of which he was charged. This is depriving him of his liberty without due process of law under the cases which have superseded the authority of those relied upon by the majority.

This is the clear import of the decision of the United States Supreme Court in 1939 in *Lanzetta v. New Jersey,* 306 U. S. 451, the decision of this court in 1952 in *Commonwealth v. Franklin,* 172 Pa. Superior Ct. 152, 92 A. 2d 272, and the decision of the Supreme Court of Pennsylvania in 1962 in *Chester v. Elam,* 408 Pa. 350, 184 A. 2d 257.

In *Lanzetta* the Supreme Court of the United States held that a statute violated due process which made it criminal to be a "gangster", which was defined as "Any [fol. 31] person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State. . . ." The court held that the interpretation of the statute by the highest court of New Jersey did not save it from being too indefinite and too vague to enforce within the requirements of due process. The court speaking through Mr. Justice Butler further said: "It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court. . . . The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

The resemblance to the statute before us is obvious. The statute here condemns no act or omission. The majority points to the common law crimes, punishable under our statutes but defined only by the common law, i.e., decisions of the courts. The precise common law definitions of such crimes, e.g., murder, rape, burglary or arson, could not contrast more sharply than they do with the majority's attempt to define what is punishable here—conduct "related to the prosecution", "reprehensible conduct", conduct "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal division of the costs", conduct "in the twilight zone between drunken driving" and something less, or something reprehensible that does not constitute a crime, such as registering falsely at a hotel as husband and wife.

[fol. 32] In *Commonwealth v. Franklin,* supra, we held that the Statute of Edward III, authorizing the court to hold under bond to keep the peace "all of them that be not of good fame", was unconstitutionally vague.

Finally in *Chester v. Elam,* supra, our Supreme Court said that the phrase "disorderly conduct" was unconstitutionally vague under both the Federal and Pennsylvania Constitutions, quoting from *Lanzetta v. New Jersey,* supra, as follows: "A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law." What the statute before us forbids under penalty of imposition of costs upon an acquitted defendant, with imprisonment for nonpayment, is something undefined in the statute whose meaning can only be guessed at by men of common intelligence.

Only one of the appellate cases relied upon or cited by the majority (*Wright v. Commonwealth,* 77 Pa. 470 (1875)) may have considered the statute in the light of the Fourteenth Amendment, and it is not at all clear that even this case did so. The statement of the case (presumably by the reporter) is that the defendant assigned for error, among other things, that the provision we are considering in § 62

of the Act of 1860, as well as § 1 of the Act of 1864, under which the defendant was indicted, was unconstitutional. While the opinion did discuss briefly the constitutionality of § 1 of the Act of 1864, as to § 62 of the Act of 1860 the court said only: "The objection to the imposition of costs, on the ground that a verdict of not guilty was rendered, is equally futile. We must presume the jury had a good reason for doing so, arising in the conduct of the defendant. And even if the indictment had been so defective that no conviction could have rested upon it, still the right [fol. 33] to impose costs existed. This was expressly decided, and good reasons stated for the decision, in Commonwealth v. Tilghman, 4 S. & R. 127." This opinion thus refers back to and relies upon the *Tilghman* case, supra, decided in 1818, and makes no reference to the Fourteenth Amendment to the Constitution of the United States or to the Constitution of Pennsylvania.

It must not be forgotten that a violation of due process can occur as a result of jury action as well as through the action of a judge. Such a violation occurs in cases in which a guilty verdict is based upon evidence obtained by illegal search and seizure, or in a trial for felony in which the defendant is not represented by counsel and has not intelligently waived such representation, or when there is any other unwaived violation of due process in the course of the trial.

This defendant has not been found guilty of a crime, or of refusing to pay for the machinery of justice which he has set in action improperly, or of some violation of another's rights which the other has vindicated by winning a law suit against him. He is not being asked to pay because of some duty he has voluntarily assumed by marriage or parenthood, nor is he asked to pay indirectly the cost of having an inheritance or other property right vindicated.

The majority suggests that it is not necessary to give notice to the defendant of what he is to be tried for, since we can rely upon his presumed knowledge of the law that under the Act of 1860 costs may be imposed upon him if he is acquitted. But for what? The act does not say. Is it,

as the majority and some other opinions indicate, because he has done "something reprehensible", or because he may be guilty even though found not guilty. Against what is he to defend? Is he to be compelled to put in evidence his [fol. 34] good character and thus give the prosecution the right to bring into evidence any previous offenses?

The majority say he has the opportunity to be heard upon his liability for costs, but about what? Is the district attorney to be permitted to discuss "reprehensible conduct" other than the crime charged, and is his counsel thus going to be compelled to scatter his defense so as to meet this indefinite charge as well as the crime for which he is indicted? Is the district attorney to be permitted to tell the jury that they may impose costs even if they have a reasonable doubt of his guilt? Surely this riddles the safeguard which the presumption of innocence and the Commonwealth's burden of proof purports to throw around the defendant. How can anything be put to the jury on this subject without discussing his record or the lack of it?

As the court below stated: "Trial Judges, as in this case, have consequently instructed juries in accordance therewith substantially in the language of the Tilghman case. There the Supreme Court, speaking through Mr. Justice Gibson, had said the Act was aimed at a defendant '. . . acquitted of actual crime, but whose conduct may have been reprehensible in some respects, or whose innocence may have been doubtful . . . The judgment is not on the indictment but on something collateral to it. The defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though on account of something, of which he was not indicted, some impropriety of conduct, or ground of suspicion, which the verdict of the jury has fastened on him . . . I grant, that a statute imposing costs, is penal in its nature . . . There may, I apprehend, be acts, such as certain kinds of fraud, that are offensive to morality, that nevertheless are not indictable . . . Wherever misconduct may be fairly im- [fol. 35] puted, either to a prosecutor or a defendant, they respectively become obnoxious to this kind of legal animad-

version, although neither guilty of, nor technically charged with a crime . . . ."

The fact that Mr. Justice Gibson found that the provision for imposition of costs upon an acquitted defendant "at first view, may appear unjust" and Judge Keller said that it "may appear anomalous" indicates the difficulty these eminent judges found in sustaining this provision even without reference to the Fourteenth Amendment. I cannot agree that they would have sustained it today in the light of the Fourteenth Amendment, as interpreted in *Lanzetta v. New Jersey*, supra, *Elam v. Chester*, supra, *Commonwealth v. Franklin*, supra. Under these authorities, this statute, insofar as it authorizes the imposition of costs upon acquitted defendants, clearly violates due process. The order of the court below should be affirmed.

ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA—
Filed December 12, 1963

Order reversed, sentence reinstated.

[fol. 36]

IN THE SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT

Allocatur Docket No. 4

COMMONWEALTH OF PENNSYLVANIA

v.

JAY GIACCIO

PETITION UNDER RULE 69 FOR ALLOWANCE OF AN APPEAL TO THE SUPREME COURT OF PENNSYLVANIA IN ACCORDANCE WITH 17 PUR. STAT. ANN. § 190—Filed December 20, 1963

To the Honorable, the Judges of the Said Court:

The petition of Peter Hearn and James C. N. Paul, counsel for defendant, respectfully requests that Your

Honorable Court allow an appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania in the above captioned case. In support thereof, petitioners respectfully represent:

1. Defendant was indicted in Chester County, Pennsylvania for the misdemeanor of unlawfully and wantonly pointing and discharging a firearm in violation of the Act of July 24, 1949, P. L. 872, § 716; 18 Pur. Stat. Ann., § 4716. Following a jury trial, he was adjudged not guilty, but ordered to pay the costs of prosecution in the amount of $230.95.

2. Pursuant thereto, the Quarter Sessions Court of Chester County ordered defendant to pay costs or give [fol. 37] security within ten days, or stand committed to jail until he complied therewith.

3. On April 21, 1962, defendant filed a motion for relief of payment of costs.

4. On January 12, 1963, following argument and reargument in support of defendant's motion, the Court granted the motion. In the accompanying opinion (Attached hereto as Exhibit "A"), the Court held that Act 375, Laws of Pennsylvania 1860, 445, 19 Pur. Stat. Ann. 1222, under which the costs were assessed, is unconstitutional because:

a. 19 Pur. Stat. Ann. 1222 contravenes the Fourteenth Amendment to the United States Constitution in that it is unnecessarily vague.

b. 19 Pur. Stat. Ann. 1222 is an improper delegation of legislative power in contravention of Article III, Section I of the Constitution of Pennsylvania.

c. 19 Pur. Stat. Ann. 1222 contravenes Fourteenth Amendment due process as that concept has been more recently developed as a doctrine of fundamental fairness in criminal procedure.

d. 19 Pur. Stat. Ann. 1222 represents an unreasonable classification and, as a result, it denies equal protection of the laws under Fourteenth Amendment.

5. On appeal (Briefs of Appellant and Appellee are attached as Exhibits "B" and "C", respectively), the Superior Court, in a majority opinion by Judge Robert E. Woodside (Attached hereto as Exhibit "D"), reversed the order of the Quarter Sessions Court and reinstated the sentence. In describing the number of federal constitutional issues involved, the majority opinion said of the Quarter [fol. 38] Sessions Court: "To our knowledge, no Court has ever found a Pennsylvania statute in such flagrant violation of the Constitution!"

6. Judge Gerald F. Flood filed a dissenting opinion (Attached hereto as Exhibit "E") in which he concluded:

> "The fact that Mr. Justice GIBSON found that the provision for imposition of costs upon an acquitted defendant 'at first view, may appear unjust' and Judge KELLER said that it 'may appear anomalous' indicates the difficulty these eminent judges found in sustaining this provision even without reference to the Fourteenth Amendment. I cannot agree that they would have sustained it today in the light of the Fourteenth Amendment, as interpreted in *Lanzetta v. New Jersey,* [306 U. S. 451 (1939)], *Elam v. Chester,* [408 Pa. 350, 184 A. 2d 257 (1962)], *Commonwealth v. Franklin,* [172 Pa. Super. 152, 92 A. 2d 703 (1952)]. Under these authorities this statute, insofar as it authorizes the imposition of costs upon acquitted defendants, clearly violates due process."

7. The Act of June 24, 1895, P. L. 212 § 7(e), providing for an appeal from the Superior to the Supreme Courts of Pennsylvania, states, *inter alia,* that an appeal may lie:

> "Second. If the case involves the construction or application of the constitution of the United States or of any statute or treaty of the United States; or
>
> "Third. If the case involves the construction or application of the constitution of Pennsylvania."

[fol. 39] 8. The reasons for requesting the allowance of an appeal are:

a. The arguments of both parties in both the Quarter Sessions Court of Chester County and the Superior Court of Pennsylvania were solely on the question of whether 19 Pur. Stat. Ann. § 1222 contravenes the United States and Pennsylvania Constitutions. The requirements of 17 Pur. Stat. Ann. § 190 have, therefore, been satisfied.

b. The majority opinion of the Superior Court incorrectly applied *Wright v. Commonwealth,* 77 Pa. 470 (1875) in support of the proposition that the constitutionality of 19 Pur. Stat. Ann. § 1222 has been judicially upheld since the ratifications of the Fourteenth Amendment and the present Pennsylvania Constitution. As the dissenting opinion of Judge Flood points out, there is no indication from the Court's opinion in *Wright* that the decision was based upon constitutional grounds.

c. The Superior Court failed to recognize that Fourteenth Amendment due process is a changing concept and that the decisions and opinions of eminent jurists nearly a century ago are not conclusive. In *Wolf v. Colorado,* 338 U. S. 25, 27 (1949), the Court said:

> " . . . [B]asic rights do not become petrified as of any one time, even though, as a matter of human experience, some may not too rhetorically be called eternal verities. *It is of the very nature of a free society to advance in its standard of what is deemed reasonable and right.* Representing, as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits [fol. 40] or the essentials of fundamental rights." [Emphasis added.]

d. The Superior Court, in its majority opinion, relied on the standard that 19 Pur. Stat. Ann. § 1222 does "substantial justice" to fend off due process assaults. "Substantial justice" offers no answer to the numerous and specific aspects of procedural and substantive due process which have been contravened.

e. The Superior Court, by its majority opinion, added "standards" for the application of 19 Pur. Stat. Ann. § 1222,* all of which are as unconstitutional as the "standards" previously used under this act.

f. The dictum of the Superior Court's majority opinion dealing with the factual situations in which 19 Pur. Stat. Ann. § 1222 should be applied** will have a profound effect upon the future use of the Act by courts of the Commonwealth. This dictum should not be permitted to stand without a review of its propriety by the Supreme Court of Pennsylvania.

g. Notwithstanding the decision of the Superior Court, 19 Pur. Stat. Ann. § 1222—the act itself and as applied—[fol. 41] contravenes the United States and Pennsylvania Constitutions.

Wherefore, petitioner respectfully requests that, pursuant to Rule 69, he be allowed to take an appeal to the

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* *E.g.*, conduct "related to the prosecution", "reprehensible conduct."

** The majority opinion said:

> "There are endless situations in which the jury might find that the defendant's *improper conduct* was responsible for the prosecution even though he was not guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fist fight were guilty of *conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs;* or where the defendant in a "drunken driving" case drank and then drove while *in that twilight zone that exists at some stage of the drinking;* or where defendants charged with adultery registered at a hotel as husband and wife but convinced the jury that they had not actually committed adultery." [Emphasis supplied.]

Supreme Court of Pennsylvania from the order of the Superior Court of Pennsylvania.

Peter Hearn, James C. N. Paul, 2001 Fidelity-Phila. Trust Bldg., Philadelphia, Pennsylvania 19109, Attorneys for Defendant.

[fol. 42] *Duly sworn to by Peter Hearn, jurat omitted in printing.*

[fol. 42a]

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

No. 218—January Term, 1964

COMMONWEALTH OF PENNSYLVANIA,

vs.

JAY GIACCIO, Appellant.

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* * * * * * *

[fol. 43]

IN THE SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT

ORDER ALLOWING APPEAL

February 3, 1964. Petition allowed and Appeal granted.

PER CURIAM.

[fol. 67]

Record for Appellee

IN THE COURT OF QUARTER SESSIONS OF CHESTER COUNTY
Nos. 225 and 226—September Sessions, 1961

COMMONWEALTH

vs.

JAY GIACCIO

RELEVANT DOCKET ENTRIES

11-16-1961, Transcript No. 225 Sept. 1961. Bill of Indictment No. 225 Sept. 1961.

11-16-1961, Transcript No. 226 Sept. 1961. Bill of Indictment No. 226 Sept. 1961.

11-16-1961, Bonds filed Nos. 225-226 Sept. 1961. Cert. copies.

11-29-1961, Subpoena.

1-12-1962, Subpoena.

1-12-1962, Order for Appearance.

[fol. 68] 1-13-1962, Bond renewed Nos. 225-226 Sept. 1961. Cert. copies.

3- 5-1962, Praecipe for Withdrawal of Appearance.

4- 2-1962, Subpoena.

4- 9-1962, List of Jury drawn.

4-10-1962, Question from Jury.

4-10-1962, Deft. Own Bond for Costs.

4-21-1962, Deft. Motion to be relieved from payment of costs.

4-23-1962, Order.

5- 3-1962, Testimony.

5- 5-1962, Order.

5-29-1962, Testimony.

6-18-1962, Petition for Rehearing.

6-25-1962, Order.

8-21-1962, Order.

10-19-1962, Portion of Charge of the Court dealing with costs.

1-12-1963, Opinion.

1-16-1963, Order.

2-28-1963, Certiorari filed.

[fol. 69]

IN THE COURT OF QUARTER SESSIONS
OF CHESTER COUNTY, PENNSYLVANIA

PORTION OF CHARGE OF THE COURT DEALING WITH COSTS

Gawthrop, P.J.:

If, but only if, you find not guilty verdicts, members of the jury, do you dispose of the costs of prosecution. Now, with regard to the Bill No. 226, where I have directed that you find a verdict of not guilty, you will have to dispose of the costs of prosecution. Whatever you may determine as to the other bill of indictment, if you find the defendant not guilty on the Bill No. 225, that is, the one involving the incident with the Bauman boy, then and only then will you consider the costs of prosecution on that bill.

Costs of prosecution may be disposed of in three ways where misdemeanor charges are found unproved by a jury. The charge made in each of these bills of indictment, as to all counts, is a misdemeanor charge. In felony cases, that is, more serious offenses such as rape, robbery, burglary and so forth, the jury has nothing to do with disposing of the costs in case of an acquittal. In misdemeanor cases it is

the jury's duty to dispose of costs if it finds not guilty verdicts. If you find the defendant not guilty on any bill of indictment you must dispose of the costs of prosecution in one of three ways. They may be placed either upon the [fol. 70] defendant or upon the prosecutor, or upon the county. Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction, the costs of prosecution may be placed upon him if his misconduct has given rise to the prosecution. If you find the defendant not guilty and find that he should not pay the costs as defendant, you may consider whether or not you will put the costs of prosecution on the prosecutor.

Now, in the bill of indictment involving the incident with Mrs. Arters, Evelyn A. Arters is endorsed as the prosecutrix on the bill of indictment. In the bill charging the affair involving the Bauman boy, Elizabeth J. Fuhrman is endorsed on the bill as the prosecutrix. You may find that those persons are or are not the actual prosecutors, as the evidence may indicate to you, in either or both of the bills, if you find that someone else actually is the prosecutor. In any event, if you find the defendant not guilty on either of these bills, or both, as to any not guilty verdict, you may consider placing the costs of prosecution on the prosecutor if you decide the defendant should not pay them, if you find that the prosecution, instead of being brought in good faith for the reasons set forth in the charge, was on the contrary brought out of malice or some ill-will, or other improper motive; and if you find that neither the defendant [fol. 71] nor the prosecutor should pay the costs of prosecution, in case of a not guilty verdict, then you may place the costs in the only other place where they may go, and that is on the County of Chester.

I repeat, you do not come to the question of disposing of the costs unless and until you find a verdict of not guilty. Now, under these rather strange circumstances, you will have to dispose of the costs of prosecution on Bill No. 226

in any event because I have directed that you return a verdict of not guilty on that bill. As to Bill No. 225, involving the Bauman boy, you won't reach that question of costs unless and until you first find the defendant not guilty. If you do find him not guilty on that bill, then you will consider the costs of prosecution.

(Remaining portion of Charge of Court not transcribed.)

(The jury retired but returned for further instructions as follows:)

The Court:

Members of the jury, you have asked this question of the Court in writing: "If a verdict of innocence is arrived at may we then divide the costs of prosecution between the defendant and the prosecutor? If so, may we decide how the costs should be divided?"

I will answer those questions in the order in which you have asked them. If you find a verdict of not guilty on either or both bills of indictment, and you recall that we [fol. 72] have directed you to find a not guilty verdict on one of the bills involving Mrs. Arters' matter, if you find a verdict of not guilty on any bill of indictment the costs on that bill of indictment may be divided between the defendant and the prosecutor, naming the prosecutor—and that is important if your verdict is to be effective—in such proportion as you determine to be appropriate. Our Act of Assembly provides that that may be done.

That answers, I think, both of your questions. In other words, first, you may, in case of a not guilty verdict, divide the costs between the prosecutor and the defendant, on that or any such bill of indictment. And in so doing you must name the prosecutor to make your verdict effective in that respect. You may divide the costs between the defendant and the prosecutor in such proportion as to you seems proper under the circumstances.

Does that answer your question?

Forelady:

Yes.

The Court:

Very well. Will you please retire to your jury room and determine upon your verdict, having in mind that if in the bill of indictment involving the boy Donald Bauman you arrive at a not guilty verdict, you will therefore, on both bills of indictment, have to dispose of the costs of prosecution in accordance with the instructions I have given you.

Will you please return to your jury room.

(End of Charge on costs.)

[fol. 73]

IN THE COURT OF QUARTER SESSIONS
OF CHESTER COUNTY, PENNSYLVANIA

DEFENDANT'S MOTION TO BE RELIEVED FROM PAYMENT OF COST

To the Honorable, the Judges of Said Court:

Jay Giaccio respectfully represents:

1. That he is the Defendant in the above criminal prosecutions: being 225 September Term 1961 and 226 September Term 1961 each involving a charge of pointing deadly weapons.

2. That he was tried before a Judge and Jury on April 9, and April 10, 1961.

3. That on April 10, 1961, said Jury returned a verdict of "Not Guilty" on 226 September Term 1961 and placed the costs of said prosecution on the county.

4. That on the aforesaid date said Jury returned a verdict of "Not Guilty" on 225 September Term 1961 and placed the costs on the defendant. Said costs are in the amount of $230.95.

5. That in placing the costs in the amount of $230.95, the Jury abused its discretion and that such placement of

costs on the defendant was contrary to law, and against the weight of the evidence.

Wherefore, Jay Giaccio, moves this Honorable Court to relieve him from the payment of said cost.

Jay Giaccio

[fol. 74]

IN THE COURT OF QUARTER SESSIONS
OF CHESTER COUNTY, PENNSYLVANIA

To the Honorable, the President Judge and the Associate Judges of the Quarter Sessions Court of Chester County, Pennsylvania:

The petition of the defendant respectfully represents:

1. The names and addresses of petitioner's attorneys are:

James C. N. Paul, R. F. D. No. 1 Blackburn Farm, Berwyn, Pennsylvania.
Peter Hearn, 2001 Fidelity Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

2. In April of 1961, the Grand Jury returned indictments charging the defendant with:

(a) Unlawfully and wantonly pointing a firearm, and

(b) Unlawfully and wantonly discharging a firearm.

3. On April 10, 1962, a jury in the Quarter Sessions Court of Chester County rendered a verdict of not guilty as to both bills, but ordered the defendant to pay costs in No. 225 totalling $230.95.

[fol. 75] 4. On April 21, 1962, the defendant filed a motion to be relieved of costs in No. 225. A hearing on the defendant's motion was held before the Quarter Sessions Court of Chester County sitting en banc on May 21, 1962.

5. On June 8, 1962, entries of appearance were made on behalf of the defendant by the above listed attorneys.

6. The instant proceedings raise fundamental issues under the United States and Pennsylvania Constitutions which are sufficiently complex to prevent an adequate presentation by the defendant, who is not trained in law.

7. At the time the defendant argued in support of his motion without the assistance of counsel, he was unaware of the constitutional issues and their bearing upon his petition for relief from costs.

8. Since the time of the hearing on May 21, 1962, the defendant has been apprised of these issues and has retained counsel to present these questions to the Court.

Wherefore your petitioner prays your Honorable Court for a rehearing on his petition for relief of costs in No. 225 and for permission to file a brief in his behalf.

James C. N. Paul, Peter Hearn, Attorneys for Petitioner.

(Affidavit)

[fol. 76]

IN THE COURT OF QUARTER SESSIONS
OF CHESTER COUNTY, PENNSYLVANIA

OPINION

Defendant was charged in the above two bills of indictment with unlawfully and wantonly pointing and discharging a firearm at each of two persons. At trial a verdict of not guilty was directed and returned on Bill No. 226, and the jury placed the costs of prosecution on the County. On Bill No. 225 the jury returned a verdict of not guilty but ordered Defendant to pay the costs. Pursuant thereto he was ordered to pay the costs forthwith or give security to pay the same within ten days and stand committed until he complied therewith. Having so posted security, thereafter Defendant who was not represented by counsel at or after

trial, having refused the Court's offer to appoint counsel to represent him, with the assistance of the District Attorney's office on request of the Court, filed a motion to be relieved of payment of costs on the grounds that imposition thereof upon him was contrary to law, an abuse of the jury's discretion and against the weight of the evidence.

Defendant argued his motion in propria persona and while the Court held the matter under consideration counsel entered their appearance for Defendant, filed a motion for reargument which was granted, and thereafter ably argued the matter and filed an extensive and well considered brief. [fol. 77] The matter is now before us for decision, and after careful consideration the motion must be granted.

Defendant attacks the constitutionality of the Act of 1860, P. L. 427, Sec. 62; 19 P.S. 1222 on the four grounds that: (1) it is void for vagueness, (2) it improperly delegates legislative power, (3) it violates basic principles of due process of law, and (4) it discriminates against defendants in misdemeanor cases.

Our research and that of counsel has discovered no Pennsylvania decision prior to the first statute on the subject, the Act of 1791, infra, holding that acquitted defendants in criminal cases bore the costs of prosecution, and it appears that the contrary was true at English common law: Stephen, History of the Criminal Law, Vol. I, page 478; Bishop, New Criminal Procedure, Vol. I, Secs. 1313, 1317. In Com. v. Tilghman, 4 S. & R. 126, however, our Supreme Court in 1818 sustained the validity of the Act of December 7, 1805, 4 Smith's Laws 204, permitting imposition of costs on acquitted defendants in misdemeanor cases, and in so doing stated that in Pennsylvania "at common law" such a defendant was liable for the costs of prosecution. Apparently no appellate decision has since stated otherwise. Kessler, Criminal Procedure in Pennsylvania, page 235, repeats the same Pennsylvania common law rule, citing Com. v. Johnson, 5 S. & R. 195 and Strein v. Ziegler, 1 W. & S. 259.

Our statute law on the subject has not been entirely consistent as an analysis of it demonstrates. The earliest [fol. 78] statute was the Act of 1791, P. L. 37, 43 and 44,

an Act to "Supplement the Penal Laws," which declared, inter alia, at page 43, that in cases where grand juries ignored bills of indictment and, at page 44, where any person was brought before a Court and charged with crime and the charge "shall appear unfounded", costs should fall on the County. There followed the Act of March 20, 1797, P. L. 281, the preamble of which recited as its purpose: "Whereas . . . persons against whom indictments are presented by the grand inquests . . . are afterwards acquitted by a petit jury . . . And whereas, by the existing laws, a party so acquitted is equally liable to costs of prosecution as if he were convicted, *which operates injustice and a punishment to the innocent: For remedy whereof . . .* " it enacted that if defendant were acquitted by a petit jury of *any indictable offense* the costs should be paid out of the county stock (Emphasis ours.) Both Acts show a clear legislative intent to relieve *all* acquitted defendants of payment of costs, and ". . . changed the odious common law principle which left the accused to pay the costs, whether convicted or acquitted; . . . ": Strein, supra, at 260.

Then followed the Act of December 7, 1805, 4 Smith's Laws 204, the Act considered in Tilghman, supra. Its preamble recited that "the laws obliging the respective counties to pay the costs of prosecutions, in *all criminal cases,* where the accused is or are acquitted, *have a tendency to promote litigation;* inasmuch as they enable restless and turbulent people to harass the peaceable part of the community, with [fol. 79] trifling, unfounded, or malicious prosecutions at the expense of the public . . . " (Emphasis ours.) Although its stated purpose was to discourage unfounded prosecutions, its terms went further. Section 1 provided that, except in felony cases, where a grand jury ignored a bill of indictment it should decide and certify whether the county or the prosecutor should pay the costs, but that in all cases of acquittal by a petit jury they should determine by their verdict whether the county, the prosecutor, or the *defendant or defendants* should pay the costs. Section 2 provided that where any jury determined that a prosecutor should pay the costs the Court should pass sentence to that effect

by committing him to jail until the costs were paid unless he gave security to pay them within ten days. So, while reciting a purpose of discouraging unfounded prosecutions and relieving the public of the costs in such cases, the Act revived the very Pennsylvania "common law" practice of imposing costs upon acquitted defendants which the Acts of 1791 and 1797 had abolished and the latter had declared to be an "injustice" and a "punishment of the innocent." At the same time it would appear that in felony cases the relief granted by the Act of 1791 continued to apply, as it does today.

Whether the words "or the defendant or defendants" were included deliberately or by inadvertence in the Act of 1805, they were incorporated again in the same language in its reenactment by the Act of 1860, supra, and have ever since been applied in misdemeanor cases. Trial Judges, as [fol. 80] in this case, have consequently instructed juries in accordance therewith substantially in the language of the Tilghman case. There the Supreme Court, speaking through Mr. Justice Gibson, had said the Act was aimed at a defendant ". . . acquitted of actual crime, but whose conduct may have been reprehensible in some respects, or whose innocence may have been doubtful . . . The judgment is not on the indictment but on something collateral to it. The defendant is not *punished* for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though *on account of something*, of which he was not indicted, some *impropriety of conduct*, or *ground of suspicion*, which the verdict of the jury has fastened on him . . . I grant, that a statute imposing costs, is *penal* in its nature . . . There may, I apprehend, be acts, such as certain kinds of fraud, that are offensive to morality, that nevertheless are not indictable . . . Wherever *misconduct* may be fairly imputed, either to a prosecutor or a defendant, they respectively become obnoxious to this kind of legal animadversion, *although neither guilty of, nor technically charged with a crime.*" (Emphasis ours.)

We are asked to reconsider the validity of a statute passed upon with approval by our Supreme Court in 1818.

That decision would be binding authority upon us except that here for the first time substantial constitutional questions are raised in the light of more recent decisions of the Supreme Court of the United States and of the Supreme Court of Pennsylvania which we believe require us [fol. 81] to reexamine the matter; cf.: Com. v. Franklin, 172 Pa. Super. Ct. 152.

The imposition of costs upon an acquitted defendant under the Act of 1805 was a punitive measure enforceable by imprisonment: Com. v. Tilghman, supra; Com. v. Harkness, 4 Binney 193. Its subsequent reenactment in the same language by the Act of 1860 indicates its interpretation has been approved by the legislature. This compels the same construction under the later Act: Statutory Construction Act of 1937, P. L. 1019, Sec. 52 (4); 46 P.S. 552 (4); Parisi v. Philadelphia Zoning Board of Adjustment, 393 Pa. 458; Bogden v. School District of Coal Township, 369 Pa. 147. But to be constitutional such a statute must contain clear standards by which to measure the conduct punished by it. If it is so vague that men of common intelligence must guess at its meaning and differ as to its application it violates the first essential of due process: Lanzetta v. New Jersey, 306 U. S. 451; Chester v. Elam, 408 Pa. 350; Com. v. Franklin, supra. The vagueness may be from uncertainty in regard to persons within the scope of such an Act, or in regard to the applicable tests to ascertain guilt: Winters v. New York, 333 U. S. 507. Fundamental fairness requires notice of what to avoid. If the purpose of the Act is not disclosed punishment may not be imposed for conduct which at the time of its commission was not forbidden by law in the understanding of persons seeking to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be [fol. 82] over-stepped is included in the concept of "due process of law." Where such notice is lacking it is said the statute is void for indefiniteness: dissenting opinion of Mr. Justice Frankfurter in Winters v. New York, supra. The Act in question is totally lacking in any tests or standards by which men of common intelligence can determine what

conduct will result in the imposition of costs and allows unbounded latitude for difference of opinion as to the circumstances in which it may be applied to acquitted defendants.

Similarly for the reasons stated in Com. v. Franklin, supra, the Act is also unconstitutional as an improper delegation of legislative power in contravention of Article III, Section 1, of the Constitution of Pennsylvania. Any statute which vests in a person or body of persons, without any standards except his or their own judgment, the power of supplying, or giving force to, or suspending its terms is unconstitutional. Judicial power is exercised only for the purpose of giving effect to the will of the legislature, which is the will of the law and not of any individual or group of persons: Franklin, supra, at 182. The Act delegates to a jury the power to inflict punishment without any fixed tests or standards to guide it in such circumstances as it may see fit to do so. In so doing it is an unconstitutional delegation of legislative power.

Defendant asserts the Act violates both procedural and substantive "due process of law" in contravention of the 14th Amendment to the Constitution of the United States, [fol. 83] as that concept has more recently developed as a doctrine of "fundamental fairness." In a procedural sense it violates that concept because it lacks standards defining, and for determination of guilt of, conduct for which the punishment may be imposed. It gives a defendant no notice of the misconduct upon which the punishment depends or of his right to defend against it. If affords no hearing on the issue of costs but only on the charge contained in the indictment to which the evidence is limited. Finally, it does not require proof beyond reasonable doubt of the misconduct underlying imposition of the penalty: In Re Oliver, 333 U. S. 257; Winters v. New York, supra. Thus it contravenes procedural due process.

Substantively the Act seems to violate "due process" by imposing a punishment or penalty upon defendant found to be innocent under the law and is a denial of "equal protection of the laws", both contrary to the 14th Amend-

ment. The fundamental unfairness of punishing the innocent is self-evident. Apparently the practice never existed at the English common law, and so far as we can determine it does not exist in any other State of the United States. It is specifically condemned in the Constitutions of Florida, North Carolina and Mississippi, and has been criticized in principle in Pennsylvania by Fuller, P.J., in Com. v. Webster, 23 Luzerne 359 as an "instrument of oppressive cruelty" which should not be tolerated in a civilized age. The Courts of four other states have indicated that costs should not be imposed on acquitted defendants. Cf. Arnold v. State (Wyoming), 306 P. 2d 368; Childers v. [fol. 84] Com., 171 Va. 456; State v. Brooks, 33 Kan. 708; Biested v. State (Nebraska), 91 N.W. 416.

Finally, the Act discriminates between innocent defendants in misdemeanor cases and those in cases of felonies generally: cf. Act of 1860, P. L. 427, Sec. 64; 19 P.S. 1223, which places costs on the County in cases of acquittal of felonies. It has been said ". . . the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow": Buck v. Bell, 274 U. S. 208. Presumably the improper conduct giving rise to felony prosecutions is of higher degree than in misdemeanor cases so that no reason or justification appears to support the distinction. The result is to impose a penalty on one accused but acquitted of the lesser, while relieving one accused but acquitted of a higher, degree of crime. This is an unreasonable classification and a denial of equal protection of the laws; Skinner v. Oklahoma, 316 U. S. 535.

We consider the imposition of costs upon acquitted defendants in misdemeanor cases is, under the modern concepts of "due process of law" and "fundamental fairness," equally as offensive to the 14th Amendment to the Constitution of the United States as was the requirement of entry of security after acquittal on penalty of commitment in default thereof, which was struck down in Com. v. Franklin, supra. What was there said at page 193ff. applies equally here,

[fol. 85] especially: "The evil of the (statute) we are considering is that it is in reality an effective power to punish in virtually unrestrained form." Under the more recent decisions of the Courts of the United States and of this Commonwealth, Sec. 62 of the Act of 1860, P. L. 427; 19 P.S. 1222, is unconstitutional and void insofar as it permits imposition by the verdict of a jury of the costs of prosecution on acquitted defendants in misdemeanor cases.

ORDER

Defendant's motion to be relieved of the costs of prosecution is granted. The verdict, insofar as it imposes upon Defendant the penalty of the payment of costs of prosecution is set aside as being contrary to law. The sentence imposed upon Defendant that he pay said costs forthwith or give security to pay the same within ten (10) days and to stand committed until he had complied therewith is vacated.

By the Court:

Thomas C. Gawthrop, P.J.

[fol. 86] [File endorsement omitted]

[fol. 87]
No. 218 January Term, 1964
Returnable 3rd Month of March 1964
List for April 20 1964 at Phila.

IN THE SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT

Superior Court of Pennsylvania, sitting at Philadelphia

No. 123—October Term, 1963

Court of Quarter Sessions of the County of Chester

No. 225—September Term, 1961

COMMONWEALTH OF PENNSYLVANIA,

v.

JAY GIACCIO.

APPEAL AND AFFIDAVIT—Filed February 5, 1964

Enter appeal on behalf of Jay Giaccio from the judgment of the Superior Court of Pennsylvania, sitting at Philadelphia, as per order of Supreme Court, allowing said Appeal, filed 3rd day of February 1964.

Peter Hearn, James C. N. Paul, Attorneys for Appellant.

Send All Notices To: Peter Hearn, (Address) 2001 Fidelity-Phila. Trust Bldg., Philadelphia, Pa. 19109.

To Patrick N. Bolsinger, Prothonotary

Supreme Court—Eastern District
County of Philadelphia, ss:

Peter Hearn, attorney for defendant and authorized by him to take this affidavit, being duly sworn, saith that said Appeal is not taken for the purpose of delay, but because Appellant believes he has suffered injustice by the judgment of Superior Court from which he appeals.

Peter Hearn.

Sworn to and subscribed before me this 5th day of February A. D. 1964.

John S. Raum, Notary Public, Phila., Phila. Co., Pa., My Commission Expires Jan. 7, 1967.

[fol. 88]

218 January Term, 1964

Docket Entries

Commonwealth of Pennsylvania, Appellant

v.

Jay Giaccio

CRIMINAL CASE

ALLOCATUR

For Appellant:
James C. N. Paul
Peter Hearn
2001 Fidelity-
Phila. Trust Bldg.
Phila., Pa. 19107

For Appellee:

• Samuel J. Halpren,
Dist. Atty.
Court House Annex,
West Chester, Pa.

• John S. Halstead,
Asst. Dist. Atty.
14 N. High Street,
West Chester, Pa.

A. Alfred Delduce

	Appeal from the Judgment of the Superior Court at No. 123 October Term, 1963, reversing Order, and Sentence reinstated, of the Court of Quarter Sessions of the COUNTY OF CHESTER, at No. 225-226 September Sessions, 1961. Appeal allowed at No. 240 Allocatur Docket No. 4, by Order of February 3, 1964.
February 5, 1964.	Appeal and Affidavit filed and Writ exit, returnable the Third Monday of March, 1964, listed for argument at the session commencing April 20, 1964.
February 7, 1964.	Record filed.
February 10, 1964.	Appearance of John S. Halsted and A. Alfred Delduce for Appellee, filed.
April 14, 1964.	Petition of Appellant for Extension of Time to 45 Minutes Allowed for Oral Argument, filed.

ORDER

4/16/64
Petition denied.

PER CURIAM.

April 22, 1964 — Argued (145)

DECISION

July 6, 1964 — The Order of the Supreme Court Is Affirmed.

Roberts, J.

Mr. Justice Cohen Files a Dissenting Opinion.

July 16, 1964. — Notice of Appellant of Intention to Appeal to the Supreme Court of the United States, and Request for Certification of Transcript of Record, filed.

October 2, 1964. — Notice of Appellant of Appeal to the Supreme Court of the United States and Request for Certification of Transcript of Record, filed, and Affidavit of Service, filed.

[fol. 89] [File endorsement omitted]

[fol. 90]

IN THE SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT

No. 218—January Term, 1964

Argued April 22, 1964

COMMONWEALTH OF PENNSYLVANIA,

v.

JAY GIACCIO, Appellant.

Appeal from Order of the Superior Court of Pennsylvania, October Term, 1963, No. 123, Reversing the Order of the Court of Quarter Sessions of Chester County at No. 225, September Sessions 1961.

OPINION OF THE COURT—Filed July 6, 1964

Roberts, J.

In the context of current interpretations of the Constitutions of the United States and of this Commonwealth, we are asked to declare invalid the Act of 1860, March 31, P.L. 427, § 62, 19 P.S. § 1222,[1] which permits the imposition by a jury of costs on defendants acquitted of misdmeanors.[2]

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[1] This Act was taken from the Act of 1804, Dec. 8, 4 Sm. 204, §§ 1, 2, and the Act of 1859, April 12, P.L. 528.

[2] The Superior Court, in this case, observed that the validity of the Act has been sustained by it and by this Court on numerous occasions. Judge Woodside, for the majority, noted:

"The validity of a statute imposing costs upon an acquitted defendant was before the Supreme Court in Commonwealth v. Tilghman, 4 S. & R. 127 (1818), where Mr. Justice Gibson prophesied that the provision in the Act of 1804 would 'prove highly beneficial' even though it, 'at first view, may appear

[fol. 91] The Act specifically provides:

> "In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return or verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

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unjust.' One hundred thirteen years later Judge Keller, speaking for this Court, said of the provision imposing costs upon acquitted defendants, 'However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of this Commonwealth and it works substantial justice.' Commonwealth v. Cohen, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931). Between these two decisions the statutory provision here questioned was examined by the appellate courts, and its use approved many times: Harger v. Commissioners of Washington Co., 12 Pa. 251 (1849); Baldwin v. Commonwealth, 26 Pa. 171 (1856); Commonwealth v. Keenan, 67 Pa. 203, 207, 208 (1871); Linn v. Commonwealth, 96 Pa. 285 (1881). In Commonwealth v. Tremeloni, 93 Pa. Superior Ct. 432 (1927) this Court reversed the court below which had set aside the costs imposed upon a defendant by a jury."

Also see *Wright* v. *Commonwealth,* 77 Pa. 470 (1875).

Appellant was charged with pointing a deadly weapon at another person in violation of Section 716 of the Penal Code, June 24, 1939, P.L. 872, 18 P.S. § 4716. The evidence was that, apparently under the apprehension that persons on a neighbor's land were about to trespass upon his own property, he fired a starting pistol in their direction. The [fol. 92] would-be trespassers, at that time, had no way of knowing that appellant was firing blanks or that the weapon was other than a live revolver. The jury acquitted appellant of the substantive offense[3] but imposed the costs of prosecution upon him.

Appellant moved to be relieved of payment of the costs, which motion was granted by the trial judge. In doing so, the court declared the Act of 1860 unconstitutional and set aside the verdict insofar as it imposed upon appellant the "penalty" of the payment of costs.

The Commonwealth appealed to the Superior Court, which reversed and reinstated the "sentence." This Court granted allocatur.

Appellant makes the general constitutional challenge that the Act violates basic principles of fairness, both procedurally and substantively. The statute is attacked as vague and lacking in sufficient standards. It is urged further that the Act is an improper delegation of legislative power in contravention of Article II, Section 1 of the Constitution of Pennsylvania. It is also contended that the Act violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because it does not treat those acquitted of felonies or of summary offenses in like manner.

At the outset, it is important to note, as did the Superior Court, that the Act of 1860 is not a penal statute, some language in the very early cases notwithstanding. Imposi- [fol. 93] tion of costs is not part of any penalty imposed even in those cases where there is a conviction. " . . . [A] direction to pay costs in a criminal proceeding is not part

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[3] However, appellant's conduct apparently did constitute an assault.

of the sentence, but is an incident of the judgment: *Commonwealth v. Dunleavy,* 16 Pa. Superior Ct. 380. And see *Commonwealth v. Moore,* 172 Pa. Superior Ct. 27, 92 A. 2d 238. Costs do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenses, *Commonwealth v. Cauffiel,* 97 Pa. Superior Ct. 202, and liability for the costs remains even after a pardon by the executive: *Cope v. The Commonwealth,* 28 Pa. 297; *County of Schuylkill v. Reifsnyder,* 46 Pa. 446." *Commonwealth v. Soudani,* 193 Pa. Superior Ct. 353, 355-56, 165 A.2d 709, 711 (1960).

While it is true that the statute empowers the court to "pass sentence to that effect," this authority must be read with the language which immediately precedes it. So considered, it is clear that the term "sentence" is not used in its strictly technical sense as the formal pronouncement to the accused of the legal consequences of his guilt.[4] It merely means an adjudication by the court in compliance with the statute after the jury's finding that the prosecutor or the defendant shall pay costs. That this is the legislative meaning of the phrase "pass sentence" is made unmistakably evident by the discretion granted to the jury to impose costs not only upon the acquitted defendant but also upon the prosecutor who is not even charged with a criminal offense. Moreover, should the grand jury return a bill "ignoramus," it shall also determine whether the county or [fol. 94] prosecutor shall pay the costs.

We conclude, therefore, that the phrase "pass sentence," as used in the statute, is synonymous with the authority of the court to assess a judgment for costs in civil cases.[5]

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[4] "Sentence" may be defined: "The judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted. Judgment formally declaring to accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is properly confined to this meaning." Black's Law Dictionary 1528 (4th ed. 1951).

[5] We do not have before us the question of the validity of that portion of the Act which calls for enforcement of the collection of the costs by imprisonment. It is sufficient to note that where a

Just as costs in civil cases may be imposed whenever permitted by statute, not as a penalty but rather as compensation to a litigant for expenses,[6] so, too, the costs under this statute represent compensation or partial reimbursement to the county for expenses incurred in a prosecution.

The civil character of costs is further supported by the authority given the jury to fasten costs upon a prosecutor whose unjustified conduct brings about a prosecution. In this event, the jury may assess all, part or none of the costs against him. If, however, the jury determines that neither the prosecutor nor the defendant were at fault, the jury may place all of the costs upon the county. If the jury determines that both were at fault, it may divide the costs between the prosecutor and the defendant equally or in any other proportion.

[fol. 95] Nothing more is here involved than utilization of the machinery of the courts of quarter sessions for the disposition of costs.

"The imposition of costs upon a successful litigant is not unknown to the courts of Pennsylvania. In equity, the Orphans' Court, and upon appeal to the appellate courts, costs may be placed where justice requires them to be, even though they be placed upon the successful party. The practice and procedure of placing costs upon an acquitted

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defendant *refuses* to pay the costs or to provide security therefor, his confinement is the result of the court's exercise of its power to punish contempt. As the Superior Court observed:

> "But if he is unable to pay the costs, he may be exonerated from paying them by proceeding under the insolvency act. This procedure is available to him not only after he has been committed to prison for failure to pay the costs, but also before he is committed. Thus, an acquitted defendant upon whom the costs have been imposed may be discharged from paying them without having to undergo any actual imprisonment. Kishbaugh's Petition, 135 Pa. 468, 19 A. 1063 (1890); In re: Collection of Fines, Cost, etc., 76 Pa. D. & C. 456, 469, 471 (1950)."

[6] See *Steele* v. *Lineberger*, 72 Pa. 239 (1872); 1 Laub, Pennsylvania Keystone, Costs § 1 (1964).

defendant who is not completely innocent or without fault has been a salutary and effective way of administering the criminal law." *Commonwealth v. King,* —— Pa. D. & C. 2d ——, —— (1963).

Turning, then, directly to the first issue presented, appellant asserts that the Act is vague and lacking in appropriate standards. For support, appellant relies on decisions wherein penal statutes have been declared invalid. We do not here have such a statute. As already noted, the imposition of costs is, in reality, civil in nature. Nor do we have a statute which attempts to create an offense without properly defining the prohibited (or required) conduct. Neither is the statute otherwise vague and uncertain or defective in failing to apprise an accused of the acts the results of which may justify imposition of costs. See *Chester v. Elam,* 408 Pa. 350, 184 A.2d 257 (1962).

The provisions of the statute constitute clear notice and inform both prosecutor and defendant that the matter of costs may be determined incidentally to the basic issue of guilt or innocence. The Superior Court quite properly ob- [fol. 96] served: "Of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury."

Assuming that there must exist a standard by which a defendant will know that he may incur costs, we are satisfied that the Act of 1860 fulfills this requirement. It is clear that the Act cannot be read by itself, but must be considered together with the particular statute creating the substantive offense and all the circumstances presented to the jury. A defendant on trial for a misdemeanor knows the charge he must meet and knows that, in the event of a conviction, he may have to pay costs as well. By the Act of 1860, a defendant is also placed on notice that if acquitted, he may have to pay all or part of the costs of the prosecution.

By judicial interpretation, the courts of this Commonwealth for over a century and a half have applied a standard of reasonableness on the issue of costs. The standard

is essentially no different from that applied by a court of equity and adequately meets the objections raised by appellant. If a defendant is charged with a misdemeanor and is brought to trial, and a prima facie case is made out, but the jury finds only reprehensible acts or misconduct which fall short of the offense charged, he may be held responsible for the costs of prosecution if his misconduct gave rise to it.[7]

A defendant charged with a misdemeanor also knows that even if the Commonwealth proves its case against him, a [fol. 97] jury may still act in his favor by returning a verdict of "not guilty and pay the costs" plus the silent admonition "but don't do it again." Indeed, it is often his fervent hope that the jury will so find.

Judge J. Frank Graff, a highly experienced and very able trial judge, in passing upon this issue in *Commonwealth v. King,* supra, —— D. & C. 2d at —— (1963), appropriately held:

> "The standard by which costs may be placed upon the defendant must arise out of the particular case upon trial. As a factual matter, from vast experience in the trial of cases, juries are reluctant upon occasions to adjudge a defendant guilty, and seek the alternative of not making a record against him, but requiring him to pay the costs, because of his reprehensible conduct. The Constitution does not require impossible standards; all that it requires is that the language conveys sufficiently definite warning as to the prescribed conduct, when measured by common understanding and practice: Roth v. United States, supra [354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed. 2d 1498 (1957)]. . . ."

We are satisfied, therefore, that the Act of 1860, as construed and applied, comports with due process of law and is constitutionally acceptable and fundamentally fair.

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[7] As a practical matter, if the Commonwealth fails to establish a prima facie case, the defendant may be discharged on demurrer and no costs may be imposed upon him.

Appellant contends that the statute denies procedural due process because the only *hearing* contemplated is the trial of the substantive offense and there is not opportunity to "defend" on the issue of costs. By this argument, appel- [fol. 98] lant concedes that there is a hearing afforded, but apparently believes that the Act should provide for a separate hearing on the matter of costs. The trial on the substantive offense offers ample opportunity to defend on the basis that defendant's conduct warrants neither a verdict of guilty nor imposition of costs. In the language of the Superior Court:

> "He has an opportunity to be heard on the question of costs. The decision of the jury is based upon evidence heard by it. The defendant has a right to question the charge of the court on the question of costs. He has the right to subsequently challenge the amount of the costs taxed, and to challenge any arbitrary verdict by the jury in imposing the costs upon him."

We also find no merit in appellant's argument that the Act of 1860 is an unconstitutional delegation of legislative power to the judiciary. We are in full accord with the Superior Court's treatment of that issue:

> "It is obvious that in authorizing the disposition of costs, the legislature has not delegated the power to the jury to make a law, but only the power to determine some fact or state of things upon which the law makes its action depend. This it may do. Locke's Appeal, 72 Pa. 491, 498 (1873); Nester Appeal, supra, 187 Pa. Superior Ct. 313, 316, 144 A. 2d 623 (1958). It is not an exercise of a legislative power by the judiciary for it, through a jury, to dispose of the costs in accordance with a statutory provision, but it would be an unconstitutional assumption of a legislative power [fol. 99] by the judiciary were the courts to ignore the statute and dispose of costs contrary to its provisions."

Finally, appellant urges that there is no rational basis for the imposition of costs on a defendant acquitted of a misdemeanor when one acquitted of an unfounded summary offense[8] or a felony[9] is immune from this burden. Consequently, appellant contends the Act of 1860 denies him equal protection of the law.

The Superior Court appropriately answered:

> "The separation of crimes into these classes and the application of different rules to the different classes has been so uniformly recognized and so firmly established in our law that the validity of legislation dealing with these classes separately need no longer be examined. Although the classification of particular crimes by the legislature may not always appear consistent, the separation of crimes into these classes and the application of different rules to each class is a matter for the legislature and its exercise of that power in separating crimes for the payment of costs is not a violation of the constitution. A classification may be discriminatory and not unconstitutional if any state of facts can [reasonably] be conceived that would sustain it. Jones & Laughlin Tax Assessment Case, 405 Pa. 421, 436, 175 A.2d 856 (1961)."

[fol. 100] In the instant situation, it appears that felony prosecutions are of such public importance that the Commonwealth is willing to bear the costs thereof. As to summary offenses, there is no jury which may impose costs.

Classification is a task exclusively for the Legislature. Our only inquiry is to determine whether a classification is patently arbitrary and utterly lacking in rational justification. *Milk Control Commission v. Battista,* 413 Pa. 652, 198 A.2d 840 (1964). The classification created by the Act of 1860 does not violate this standard, and it must be permitted to stand.

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[8] Act of Sept. 23, 1791, 3 Sm.L. 37, § 13, 19 P.S. § 1221.

[9] Act of March 31, 1860, P.L. 427, § 64, 19 P.S. § 1223.

Appellant has failed to meet his heavy burden of proving that the Act of 1860 clearly, palpably and plainly violates the Constitution. *Milk Control Commission v. Battista*, supra.

We share the Superior Court's concluding comment:

> "The statutory provision here attacked has thrice been enacted by the legislature; it has twice been held constitutional by the Supreme Court; it has been examined, tested, construed and applied for a century and a half; it is believed by many able trial and appellate court judges to do substantial justice; it constitutes a practical and realistic answer to the problem of costs. We can find no reason that would justify our holding it unconstitutional."

The order of the Superior Court is affirmed.

Mr. Justice Cohen files a dissenting opinion.

[fol. 101] [File endorsement omitted]

[fol. 102]

DISSENTING OPINION—Filed July 6, 1964

COHEN, J.

I would adopt the dissenting opinion of Judge Flood, 202 Pa. Superior Ct. 310, 196 A. 2d 189 (1963), and reverse the judgment of the Superior Court.

[fol. 103] [File endorsement omitted]

[fol. 104]

IN THE SUPREME COURT OF PENNSYLVANIA

FOR THE EASTERN DISTRICT

January Term, 1964

No. 218

JAY GIACCIO, Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA, Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed October 2, 1964

I. Notice is hereby given that Jay Giaccio, appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of Pennsylvania which affirmed the sentence herein and which was entered on July 6, 1964.

This appeal is taken pursuant to 28 U.S.C.A. §1257(2).

Appellant was indicted for the misdemeanor of pointing a deadly weapon at another person in violation of §716 of the Penal Code of Pennsylvania, Act of June 24, 1939, P. L. 872; Pa. Stat. Ann. tit. 18, §4716. Following trial, a jury rendered a verdict of not guilty, but it assessed the costs of prosecution against appellant pursuant to the Act of March 31, 1860, P.L. 427, §62; Pa. Stat. Ann. tit. 19, §1222. Appellant was thereafter sentenced to pay costs in the amount of $230.95 or be committed to jail until paid. Appellant, having posted security, is not presently confined to jail.

II. The Prothonotary of the Supreme Court of Pennsylvania will please prepare a transcript of the record in this case for transmission to the Clerk of the Supreme Court of [fol. 105] the United States and include in said transcript the following:

A. Relevant docket entries in the Court of Quarter Sessions of Chester County, Pennsylvania, as reproduced in the Record printed for and presented to the Superior and Supreme Courts of Pennsylvania.

B. Relevant portion of charge of the trial court as reproduced in the Record printed for and presented to the Superior and Supreme Courts of Pennsylvania.

C. Defendant's Motion to be Relieved From Payment of Costs as reproduced in the Record printed for and presented to the Superior and Supreme Courts of Pennsylvania.

D. Petition for Rehearing as reproduced in the Record printed for and presented to the Superior and Supreme Courts of Pennsylvania.

E. Opinion of the Trial Court as reproduced in the Record printed for and presented to the Superior and Supreme Courts of Pennsylvania.

F. Order of the Trial Court as reproduced in the Record printed for and presented to the Superior and Supreme Courts of Pennsylvania.

G. Appeal to Superior Court of Pennsylvania.

H. Superior Court docket entries.

I. Superior Court Opinions as reproduced in the Supplemental Record printed for and presented to the Supreme Court of Pennsylvania.

J. Superior Court Order as reproduced in the Supplemental Record printed for and presented to the Supreme Court of Pennsylvania.

K. Petition for Allowance of an Appeal to Supreme [fol. 106] Court of Pennsylvania as reproduced in the Supplemental Record printed for and presented to the Supreme Court of Pennsylvania.

L. Order granting appeal as reproduced in the Supplemental Record printed for and presented to the Supreme Court of Pennsylvania.

M. Appeal to Supreme Court of Pennsylvania.

N. Supreme Court docket entries.

O. Supreme Court Opinions.

P. Supreme Court Order.

III. The following questions are presented by this appeal:

A. Whether the Act of March 31, 1860, P.L. 427, §62; Pa. Stat. Ann. tit. 19, §1222—as a punitive statute requiring that its procedure of enforcement satisfy the basic requirements of due process of law embodied in the United States Constitution, Article XIV, §2,—is designedly, unnecessarily and, therefore, unconstitutionally vague?

B. Whether the Act of March 31, 1860, P.L. 427, §62; Pa. Stat. Ann. tit. 19, §1222 contravenes the basic requirements of due process of law embodied in the United States Constitution Article XIV, §2, because it violates basic principles of fundamental fairness, both in a procedural and a substantive sense?

C. Whether the Act of March 31, 1860, P.L. 427, §62; Pa. Stat. Ann. tit. 19, §1222 violates the "equal protection of the laws" embodied in the United States Constitution Article XIV, §2, because it discriminates against defendants in misdemeanor cases by withdrawing from acquitted defendants in some criminal cases protections which are be- [fol. 107] stowed in other criminal cases in the absence of any rational basis for making such distinction?

Peter Hearn, James C. N. Paul, 2001 Fidelity-Philadelphia Trust Bldg., 123 South Broad Street, Philadelphia, Pennsylvania 19109, Attorneys for Appellant.

[fol. 108] Affidavit of Service (omitted in printing).

[fol. 109] Triple Certificate to foregoing transcript (omitted in printing).

[fol. 112]

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

January Term, 1964

No. 218

COMMONWEALTH OF PENNSYLVANIA,

vs.

JAY GIACCIO, Appellant.

PETITION UNDER UNITED STATES SUPREME COURT RULE 13 FOR EXTENSION OF TIME UNTIL JANUARY 15, 1965 IN WHICH TO DOCKET THE APPEAL OF THE ABOVE CAPTIONED CASE TO THE UNITED STATES SUPREME COURT AND TO FILE THE RECORD THEREOF WITH THE CLERK OF THAT COURT —Filed November 23, 1964

To the Honorable Chief Justice of the Supreme Court of Pennsylvania:

Appellant, by his attorneys, Peter Hearn, James C. N. Paul and Paul J. Mishkin, respectfully requests that the Chief Justice of the Supreme Court of Pennsylvania extend the time until January 15, 1965 in which to docket the appeal of the above captioned case to the Supreme Court of the United States and to file the Record thereof with the Clerk of that Court. In support thereof, petitioner respectfully represents:

1. Appellant has filed a Notice of Appeal to the Supreme Court of the United States appealing the Judgment and Order of the Supreme Court of Pennsylvania in the above captioned case entered on July 6, 1964.

[fol. 113] 2. Under the time limit set forth in United States Supreme Court Rule 13, appellant must docket his

appeal and file the Record with the Supreme Court by December 1, 1964.

3. Rule 13 permits any Justice of the Court whose decision is being appealed to enlarge the time for docketing the case with the Supreme Court of the United States upon good cause being shown.

4. Good cause for such extension has been shown in the instant case because:

a. Chief counsel, Peter Hearn, is scheduled to commence a three week trial in the United States District Court on December 7, 1964 and is so extensively engaged in preparation of that case that he cannot devote sufficient time to the final preparation of the Jurisdictional Statement required in the above captioned case.

b. Additional counsel, Paul J. Mishkin has agreed within the last three days to enter his Appearance and to take part in the appeal; additional time is needed to discuss all aspects of the appeal with additional counsel.

Wherefore, petitioner respectfully requests that the Chief Justice of the Supreme Court of Pennsylvania extend the time until January 15, 1965 in which to docket the appeal [fol. 114] of the above captioned case to the Supreme Court of the United States and to file the Record thereof with the Clerk of that Court.

Respectfully submitted,

Gerald W. Spivack, For Peter Hearn.

[fol. 115] *Duly sworn to by Gerald W. Spivack, jurat omitted in printing.*

[fol. 116]
Per Curiam 11/24/64

Petition granted.

11-25-64 Counsel & Clerk of U. S. Supreme Ct advised

Peter Hearn, James C. N. Paul, Paul J. Mishkin, Pepper, Hamilton & Scheetz, Attorneys at Law, 2001 Fidelity-Philadelphia Trust Building, Philadelphia, Pa. 19109.

[File endorsement omitted]

[fol. 117] Deputy Prothonotary's Certificate to foregoing paper (omitted in printing).

[fol. 118]

SUPREME COURT OF THE UNITED STATES

No. 831—October Term, 1964

JAY GIACCIO, Appellant,

v.

PENNSYLVANIA.

Appeal from the Supreme Court of the Commonwealth of Pennsylvania, Eastern District.

ORDER NOTING PROBABLE JURISDICTION—May 24, 1965

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted] 47

JAY GIACCIO,
Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee.

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT.

PETER HEARN,
JAMES C. N. PAUL,
PAUL J. MISHKIN,
2001 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Penna. 19109,
Attorneys for Appellant.

International, 711 So. 50th St., Phila., Pa. 19143

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STATUTES AND AUTHORITIES CITED (Continued).

IN THE

Supreme Court of the United States.

October Term, 1964

No.

JAY GIACCIO,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellant, Jay Giaccio, prays that your Honorable Court note its probable jurisdiction, require briefs and oral argument on the merits and reverse the judgment of the Supreme Court of Pennsylvania entered in the above entitled case. In support thereof, appellant submits the following Jurisdictional Statement.

OPINIONS BELOW.

The majority and dissenting opinions of the Supreme Court of Pennsylvania are reported at 415 Pa. 139, 202 A. 2d 55 (1964), and are attached hereto as Appendices A and B, respectively. The majority and dissenting opinions of the Superior Court of Pennsylvania are reported at 202 Pa. Super. 294, 196 A. 2d 189 (1963), and are attached hereto as Appendices C and D, respectively. The opinion of the trial court is reported at 30 Pa. D. & C. 2d 463 (Q. S. Chester 1963), and is attached hereto as Appendix E.

JURISDICTION.

Appellant was indicted for a misdemeanor and tried before a jury. He was acquitted. As a part of its verdict, however, the jury assessed the costs of prosecution in the amount of $230.95 against him pursuant to the Act of March 31, 1860, P. L. 427, § 62; PA. STAT. ANN., tit. 19, § 1222.[1]

Subsequently, appellant filed a Motion for Relief of Costs, which, following two hearings, was granted. The trial court held that the Act of 1860 was unconstitutional as applied to an acquitted defendant on the three federal grounds presented to this Court. The trial court's judgment and order were subsequently reversed on appeal, with both the Superior and Supreme Courts of Pennsylvania upholding the Act of 1860 against the specific constitutional objections raised initially in the trial court.

The judgment of the Supreme Court of Pennsylvania was entered on July 6, 1964. A Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Pennsylvania on October 2, 1964. On November 24, 1964, the Supreme Court of Pennsylvania granted an extension of the time under Rule 13 to docket the appeal and file the Jurisdictional Statement until January 15, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal: *Winters v. New York*, 333 U. S. 507; *Lanzetta v. New Jersey*, 306 U. S. 451.

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1. Hereinafter the "Act of 1860".

STATUTE INVOLVED.

The Act of 1860 provides:

"In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant, shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return of verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

QUESTIONS PRESENTED.

The questions presented are substantially those affirmed by the trial court but subsequently rejected by two State appellate courts:

1. Is the Act of 1860 unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution, in that it permits punishment

(a) without any standards prescribed by the statute itself;

(b) on a finding that defendant has been guilty of "some misconduct" or "reprehensible misconduct" which "misconduct" is not otherwise defined or identified at any time, either prior to or during the criminal proceedings?

2. Does the combined effect of the procedural due process violations arising from operation of the Act of 1860 and the mere fact that the Act permits punishment of an innocent person, contrary to every other English speaking jurisdiction where the practice was found to have been considered, violate the fundamental fairness required of all criminal proceedings by the Fourteenth Amendment due process clause?

3. Does the Act of 1860 violate the "equal protection of the laws" embodied in the Fourteenth Amendment because it discriminates against defendants in misdemeanor cases by imposing upon them a burden from which defendants in *both* felony cases and cases involving summary offenses are specifically protected in the absence of any rational basis for making such a distinction?

STATEMENT OF THE CASE.

Appellant was tried in the Court of Quarter Sessions in Chester County, Pennsylvania, on two bills of indictment charging him with unlawfully and wantonly pointing and discharging a firearm at each of two persons. The alleged offenses were misdemeanors and violations of the Act of June 24, 1939, P. L. 872, § 716; PA. STAT. ANN. tit. 18, § 4716. The maximum penalty for the indicted offense was a fine not exceeding $500 or imprisonment not exceeding one year or both.

At trial—at which appellant presented his defense *in propria persona*—a verdict of not guilty was directed by the trial court as to one bill (No. 226, September 1961) and the jury placed the costs of prosecution upon the County. As to the second bill (No. 225, September 1961)—in issue here—the jury returned a verdict of not guilty but ordered appellant to pay the costs of the prosecution in the amount of $230.95 pursuant to the Act of 1860. The court, thereupon, ordered defendant to pay costs or give security within ten days or stand committed to jail unless he complied therewith. Having so posted security, defendant filed a Motion to be Relieved of Payment of Costs on the ground, *inter alia*, that the imposition of costs was contrary to law.

Defendant initially argued his Motion *in propria persona* on April 27, 1962. While the Court held the matter under advisement, counsel entered their appearance for appellant and filed a Petition for Re-Hearing. The Petition stated, *inter alia*, that "the instant proceedings raise fundamental issues under the United States and Pennsylvania Constitutions which are sufficiently complex to prevent an adequate presentation by the defendant who is not trained in the law." A rehearing was granted and counsel thereupon argued the three basic federal constitutional questions which are presented in this appeal. On January

12, 1963, the trial court sustained appellant's contentions as to all three and held that the Act of 1860 was unconstitutional as applied to an acquitted defendant.

On December 12, 1963, the Superior Court of Pennsylvania reversed the order of the trial court and reinstated the sentence. The majority opinion was written for the Court by Judge Robert E. Woodside. Judge Gerald F. Flood filed a dissenting opinion which declared that the Act of 1860 clearly violates federal due process.

On appeal to the Supreme Court of Pennsylvania, the order of the Superior Court was affirmed with Mr. Justice Samuel J. Roberts writing the opinion for the four-Justice majority (two Justices did not take part in the consideration of the case). Mr. Justice Herbert B. Cohen filed a dissenting opinion stating that he would adopt the opinion of Judge Flood of the Superior Court.

Appellant filed a timely Notice of Appeal to the Supreme Court of the United States. Having posted the necessary security, defendant is not presently confined to jail.

GROUNDS FOR SUBSTANTIAL NATURE OF FEDERAL QUESTIONS PRESENTED.

I. The Act of 1860 Is Void for Vagueness Because It Lacks Any Statutory Criteria Whatsoever for Its Enforcement and Because, as Construed, It Permits the Punishment of Those—Such as Appellant—Who Have Been Adjudged to Be Guilty of No More Than "Impropriety of Conduct", "Reprehensible Conduct" or "Some Misconduct".

A. The Act of 1860 Is a Punitive Measure; It Forcibly Deprives a Defendant of His Property or His Liberty if He Does Not Pay.

The majority opinion of the Supreme Court of Pennsylvania concluded that a discussion of due process protections was academic to this case because the Act of 1860 was "civil" rather than "penal" in character[2] (3a-5a). Little light would be shed on this case by appellant making a lengthy argument that the Act of 1860 is indeed "penal". The essential point is simply this: the statute imposes a penalty-burden upon defendants in criminal cases. As Judge Flood correctly pointed out in his dissenting opinion in the Superior Court, 202 Pa. Super. at 312 (26a):

> "No amount of dialectic can alter the fact that this statute provides that an accused may go to jail without having been convicted of any crime—indeed after having been acquitted of the only crime of which he was charged."

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2. In reaching this result the Court overruled its own pronouncements dating back as far as 1818. In *Commonwealth v. Tilghman*, 4 S. & R. 127, 129 (Pa. 1818), Mr. Justice Gibson stated, "I grant, that a statute imposing costs, is penal in nature and must be construed strictly . . ." In *Clemens v. Commonwealth*, 7 Watts 485 (Pa. 1838) the Court said, "The statute which enables a grand or petit jury to punish with costs is penal, and to be strictly construed."

The liability imposed under the Act of 1860—commitment to jail—is incurred only in criminal cases and as an adjunct of criminal law enforcement. The liability is only incurred, so Pennsylvania's state courts have said,[3] when defendants are "guilty of misconduct".

This punitive character is conclusively revealed in the following portion of the trial judge's charge in this case as to the application of the Act of 1860 (The entire charge relevant to costs is attached hereto as Appendix F.):

> "Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been *guilty* of *some misconduct* less than the offense which is charged but nevertheless *misconduct* of some kind as a result of which he should be required *to pay some penalty short of conviction,* the cost of prosecution may be placed upon him if his misconduct has given rise to the prosecution." [Emphasis supplied.]

See also, *Lowe v. Kansas,* 163 U. S. 81 (requirement that prosecutor pay costs must meet the requirements of procedural due process); *Commonwealth v. Franklin,* 172 Pa. Super. 152, 92 A. 2d 272 (1952) (requirement that *acquitted* defendant post "peace" bond must comply with due process).

B. The Act of 1860 Lacks Any Statutory Criteria for Its Enforcement.

A statute imposing liability of this character must contain standards of guilt. The Act of 1860 has none. Without such standards it is void for vagueness. See *Baggett v. Bullitt,* 377 U. S. 360, and cases cited therein; *Lanzetta v. New Jersey,* 306 U. S. 451.

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3. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 127 (Pa. 1818); *Commonwealth v. Daly,* 11 Pa. Dist. 527 (Q. S. Clearfield 1902); *Commonwealth v. King,* 33 Pa. D. & C. 2d 235 (Q. S. Allegheny, 1963).

The "void for vagueness" doctrine is a command of due process; it rests on the following principles, both of which are lacking in the Act of 1860:[4] (a) if the state proposes to impose liability for some conduct it must give fair warning to the public by defining, as much as possible, the prohibited conduct;[5] and (b) likewise there must be a standard sufficiently precise to guide the court and jury so that there will not be unfair discrimination or "*ex post facto*" treatment in the enforcement of the statute.[6]

The absence of a standard also prevents an appellate court from ascertaining what act the jury sought to punish and thereby effectively negating any chance of proper appellate review. It is possible that a jury would punish a defendant for a perfectly legal or, even more serious, a constitutionally protected act. Yet, the appellate court has no way of knowing whether either was involved.

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4. See Note, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 68 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. Q. 195 (1955).

5. Mr. Justice Frankfurter, dissenting in *Winters v. New York*, 333 U. S. 507, 524, stated:

"Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of 'due process of law.' The legal jargon for such failure to give forewarning is to say that the statute is void for 'indefiniteness.'"

6. Note, Amsterdam, 109 U. OF PA. L. REV. 67 at 93:

"Many legal responsibilities may be made to turn—as many common-law duties have traditionally turned—upon the 'reasonableness' of conduct as viewed by some trier of fact. But it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation—as also in the realm of more obviously absolute official discretion—that there exists the risk of continuing irregularity with which the vagueness cases have been concerned."

In *Commonwealth v. King*, 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), defendant was indicted and charged with the crime of libel in contravention of § 412 of the Act of June 24, 1939, P. L. 872; PA. STAT. ANN., tit. 18, § 4412. The jury initially returned a verdict of not guilty without disposing of the costs but was sent back for further consideration as to that issue. It thereupon assessed costs against defendant pursuant to the Act of 1860. Subsequently, the Court rejected defendant's contention that the Act violated the Fourteenth Amendment and denied a motion in arrest of judgment, holding that costs may be assessed against an acquitted defendant when his conduct is "serious and reprehensible." Yet, the act of defendant's which the jury sought to punish may very well have been one constitutionally protected by the rule of *Garrison v. Louisiana*, — U. S. —, 33 U. S. LAW WK. 4019, decided this Term, which expressly held that the First Amendment strongly restricts the power of states to impose sanctions for *criminal* libel. An appellate court reviewing the *King* case could not tell.[7] This absence of statutory criteria makes the Act of 1860 unconstitutionally vague.

C. The Act of 1860 Unconstitutionally Permits Punishment for "Reprehensible" or "Improper" Conduct or, as in the Charge in This Case, for "Some Misconduct".

A statute invalid under the "void for vagueness" doctrine is unconstitutional either because on its face or as construed by the courts, it offers no standard of conduct that is possible to know: *Winters v. New York*, 333 U. S. 507; *American Seeding Machine Co. v. Kentucky*, 236 U. S. 660; *International Harvester Co. v. Kentucky*, 234 U. S. 216.

The authoritative, long accepted Pennsylvania interpretation of the Act of 1860 comes from a case involving the Act of 1804, 4 Laws of Pa. 204 (Smith 1810), a prede-

7. Cf. *Jackson v. Denno*, 378 U. S. 368.

cessor which was substantially identical in wording to the Act of 1860.[8]

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8. The statutory history of the Act of 1860 reveals a picture not of rational legislation, reflecting considered legislative judgment, but, on the contrary, a quixotic, unexplainable law which may have been the result only of legislative accident.

In 1791, in an act entitled "A Supplement to the Penal Laws of this "State," the Pennsylvania Assembly declared that (1) in cases of "outlawry"; (2) in all cases in which the grand jury "returned ignoramus" on bills of indictment; and (3) in all cases "where any person shall be brought before a Court . . . on the charge . . . of having committed a crime, and such charge, upon examination, shall appear to be unfounded," the costs should fall on the county. 3 Laws of Pa. 37 (Smith 1810).

Subsequently, in 1797, the Assembly clarified the law: "Whereas," (it declared) ". . . a party . . . acquitted [of an indictable offense] is equally liable to costs of prosecution as if he were convicted, *which operates injustice, and a punishment to the innocent* . . . Be it therefore enacted . . . that . . . all costs accruing on all bills . . . charging . . . [any] indictable offense, shall, if such party be acquitted by a petit jury. . . be paid out of the county stock . . . ." 3 Laws of Pa. 281 (Smith 1810). (Emphasis added.)

This enactment plainly demonstrates an original legislative intent in Pennsylvania to avoid what was evident even then, and what should be equally evident now, that the imposition of costs on acquitted defendants is a harsh and unjust practice "as punishment" unfairly imposed on innocent persons. In 1804 the Assembly enacted the following statute, 4 Laws of Pa. 204 (Smith 1810) (which was never signed by the Governor but became law nevertheless because it was returned by him too late to avoid becoming law):

> "WHEREAS experience has proved, that the laws obliging the respective counties to pay the costs of prosecutions, in all criminal cases, where the accused is or are acquitted, have a tendency to promote litigation: inasmuch as they enable restless and turbulent people to harass the peaceable part of the community, with trifling, unfounded, or malicious prosecutions at the expense of the public: Therefore,
>
> "SECT. I. *Be it enacted by the Senate and House of Represenatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That from and after the first of November next, in all prosecutions, cases of felony only excepted, if the bill or bills of indictment shall be returned 'ignoramus' the grand jury who returns the same shall decide and certify on such bill, whether the county or the prosecutor shall pay the costs of prosecution; and

Justice Gibson, in *Commonwealth v. Tilghman, supra,* 4 S. & R. 126 (Pa. Supreme Ct. 1818) (the first reported appellate case in Pennsylvania to involve the rule that an acquitted defendant may be forced to pay costs), explained the rationale of the act and the focal point of its provisions:

> ". . . a defendant, acquitted of actual crime, but *whose conduct may have been reprehensible* in some respects, or whose *innocence may have been doubtful.* . . . ."

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in all cases of acquittals, by the petit jury, on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county or the prosecutor, *or the defendant or defendants,* shall pay the costs of prosecution; and the jury so determining, in case they direct the prosecutor to pay the costs, shall name him or them in their return or verdict. [Emphasis supplied.]

"SECT. II. *And be it further enacted by the authority aforesaid,* That whenever any jury shall determine, as aforesaid, that the prosecutor or prosecutors shall pay the costs, the court in which the said determination shall be made, shall forthwith pass sentence to that effect, and order him, her or them committed to the gaol of the county until the costs are paid, unless he, she or they give security to pay the same within ten days."

From the context and expressed purposes of the act, it seems clear that the key to the statute lies with the words "or the prosecutor," and that the legislature was primarily concerned with ill-founded prosecutions and the desirability of relieving the county of *those* costs. See *Commonwealth v. Harkness,* 4 Binn. 194, 195-96 (Pa. Supreme Ct. 1811). In light of this, it seems that the words "or the defendant" (italicized above) were inserted either by mistake or without clear recognition of their ramifications. For the act, read literally, as, of course, it has been, reverted to a practice which only a few years before had been repudiated by the legislature as "unjust" and which was even then constitutionally forbidden by other state constitutions. See, e.g., Fla. CONST. Declarations of Rights § 14; Ga. CONST. art. I, Bill of Rights § 1, para. X; Miss. CONST. art. 14, § 261; N. C. CONST. art. I, Declaration of Rights § 11.

The power of the jury to assess costs against innocent misdemeanor defendants was continued in the same language in the Act of 1860. Presumably the legislature, in enacting this statute, simply swept together all the existing legislation on the subject—without consideration of its merits.

"The judgment is not on the indictment, but on something collateral to it. The defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though, on account of something, of *which he was not indicted*, some *impropriety of conduct*, or *ground of suspicion*, which the verdict of the jury has fastened on him. . . ."

"There may, I apprehend, be acts, such as certain kinds of fraud, that are *offensive to morality*, that nevertheless are not indictable. . . ." [Emphasis supplied.]

This characterization has been repeated many times.[9] It was also the basis of the Court's charge in this case. See the relevant portion of charge, p. 8, *supra*.

Most recently, the standard was made even less definite by the majority opinion of the Superior Court in this case, 202 Pa. Super. at 308 (21a-22a):

"There are endless situations in which the jury might find that the defendant's improper conduct was responsible for the prosecution even though he was not guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fistfight were guilty of conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs; or where the defendant in a 'drunken driving' case drank and then drove while in that twilight zone that exists at some stage of the drinking; or where defendants charged with adultery registered at a hotel as husband and

9. *E.g., Baldwin v. Commonwealth*, 26 Pa. 171 (1856); *Commonwealth v. Daly*, 11 Pa. Dist. 527 (Q. S. Clearfield 1902).

wife but convinced the jury they had not actually committed adultery." [10]

These Pennsylvania cases demonstrate that the statute as construed offers no clear standard of guilt, that it is not "fenced in" sufficiently to give notice of what is to be punished.

In *Baggett v. Bullitt*, 377 U. S. 360, decided last Term, the statute involved required an employee of the State of Washington, as a condition of his employment, to take an oath that he was not a "subversive person". The act was struck down by this Court which found the oath framed in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." 377 U. S. at 367.

In *Lanzetta v. New Jersey*, 306 U. S. 451, the statute provided for the fine or imprisonment of "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or any other state . . ." Such person was declared to be a "gangster" and subject to punishment for that reason. After an examination of the meaning of "gang" and

10. The harmful effect of Judge Woodside's majority dicta is vividly illustrated by a portion of Judge Flood's dissenting opinion in the Superior Court, 202 Pa. Super. at 313 (27a):

> "The statute here condemns no act or omission. The majority points to the common law crimes, punishable under our statutes but defined only by the common law, i.e., decisions of the courts. The precise common law definitions of such crimes, e.g., murder, rape, burglary or arson, could not contrast more sharply than they do with the majority's attempt to define what is punishable here —conduct 'related to the prosecution', 'reprehensible conduct', conduct 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal division of the costs', the conduct in the twilight zone between drunken driving and something less or something reprehensible that does not constitute a crime, such as registering falsely at a hotel as husband and wife."

"gangster," this Court held the statute invalid. The statute condemned no act or omission; the terms it employed to indicate what it purported to punish were, in the eyes of the Court, so "vague and uncertain" as to be "repugnant" to due process.

The *Baggett* and *Lanzetta* cases did not turn simply on the elusive meaning of the words "subversive person" or "gang". Void for vagueness issues are not problems in semantics. The *Lanzetta* statute was obviously an attempt to authorize the harassment—the punishment of individuals suspected of wrongdoing—suspected of some sort of misconduct which was deliberately or inexcusably left undefined. Justice Frankfurter, speaking of *Lanzetta* (in *Winters v. New York*, 333 U. S. 507, 540 (dissenting opinion), identified the rationale of that decision, the vice of vagueness for which the statute was struck down, in the following terms:

> "Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable . . . although not chargeable with any particular offense."

This, then, is the gist of *Lanzetta* and the very same evil at which this Court struck in declaring unconstitutional the statute involved in *Baggett*. It is the rationale of many similar cases, old and recent, such as *Stoutenburgh v. Frazier*, 16 App. D. C. 229 (D. C. Cir. 1900), and *People v. v. Alterie*, 356 Ill. 307, 190 N. E. 305 (1934), and the cases cited with approval in *Baggett v. Bullitt, supra*, 377 U. S. at 367. We submit that the Act of 1860 has precisely the same evil.

It might be noted that by invalidating *this* act, this Court need not hold that the legislature may enact no statute imposing costs on acquitted defendants. We might concede, *arguendo*, that situations can be conceived in which it would not be unfair to require acquitted defendants to pay costs. But these situations must be precisely de-

fined; the elements of this punitive liability must be adequately spelled out. The present statute can be used to permit a jury, unrestrained, to punish any sort of conduct or misconduct which it may, *ex post facto,* decide should be penalized.

D. If Allowed to Stand, the Majority Opinions Below Will Leave State Trial Courts in Pennsylvania With a Completely Unconstitutional Interpretation of the Act of 1860 and Will Doubtless Result in an Even Broader Use of Its Punitive Provisions in the Future.

The impact of the decision here will extend well beyond the present case. In *Commonwealth v. Welsh,* Q. S. Bucks Co. Pa., Nov. Term, 1962, Nos. 174-175, defendant was indicted and charged with the misdemeanor of "macing", in contravention of the Act of April 6, 1939, P. L. 16, § 1; PA. STAT. ANN., tit. 25, § 2374. Although acquitted by a jury, defendant was assessed costs in the amount of $2,098.59. The act under which the defendant was indicted calls for a maximum fine of $1,000 or a one-year prison term or both. Defendant has subsequently filed a Motion In Arrest of Judgment, raising substantially the same federal questions presented in this case. The motion is being held under advisement pending outcome of the instant case.

Commonwealth v. King, 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), p. 10, *supra,* has been appealed to the Superior Court of Pennsylvania; however, upon application by appellant, argument has been deferred pending the outcome of this case.

Although appellant has no definitive statistics, it is his belief that costs are assessed against acquitted defendants in most Pennsylvania counties. However, the number of reported cases is relatively few, apparently because defendants are so relieved at being acquitted of the indicted

offense that they would prefer to pay the costs rather than engage in additional litigation.

Unless this Court notes its probable jurisdiction, hears argument and reverses, the "standards" of "conduct related to the prosecution" and "reprehensible conduct" contained in the Superior Court's majority opinion will find their way into jury charges of future Pennsylvania cases just as "guilty of some misconduct" and "misconduct of some kind" became part of the charge in this case (39a). The inescapable result of these dicta, if not reversed, will be a use of the Act of 1860 over a broader factual scale in Pennsylvania in the coming years.[11]

II. The Act's Procedural Unfairness and Its Punishment of Innocent Persons Clearly Deprive Appellant of Due Process of Law.

Due process of law is a guarantee of fundamental fairness. The Act of 1860 falls short of that standard in two ways. It is unconstitutional not only because it sanctions the punishment of innocent persons, but equally because of the method by which it permits "guilt" to be established.

A. The Act of 1860 Is Unfair and Violates Due Process in a Procedural Sense Because:

(1) It is unconstitutionally vague—it is utterly lacking in standards defining the proscribed conduct by which the determination of guilt may be made. (See Point I, *supra.*)

(2) Although it permits the imposition of a punitive sanction, it nevertheless strips the defendant of his right to defend against this punishment by failing to provide him with the requisite notice of the precise misconduct upon which liability is to be founded. *In re Oliver,* 333 U. S. 257.

11. It is not without significance to note that the two cases awaiting the outcome here—*Welsh* and *King*—involve conduct related to public affairs and present the real possibility that the defendants were punished for constitutionally protected action.

(3) It fails to provide a hearing *on the issue the jury is to determine.* The only hearing contemplated is the hearing on the crime charged in the indictment.[12] Therefore, since the evidence is limited to that charge, other defense evidence which would be relevant only to the imposition of costs under the Act of 1860 may be barred on the ground that it is not relevant to the indictment. This failure to afford the defendant a reasonable opportunity to defend himself constitutes a denial of due process of law. *In re Oliver, supra.*

(4) It relieves the prosecution of the burden of proving those elements which it must prove to establish the requisite "misconduct" beyond a reasonable doubt. It is fundamental that due process in a criminal proceeding includes the right to be deemed innocent until proven guilty beyond a reasonable doubt. *Leland v. Oregon,* 343 U. S. 790, 802-03 (Frankfurter, J., dissenting); *Brinegar v. United States,* 338 U. S. 160, 174 (dictum); *Coffin v. United States,* 156 U. S. 432, 453-56 (dictum). Although the prosecution may have the advantage of reasonable presumptions,[13] nevertheless, the basic burden always remains upon the prosecution.

Each one of these defects, we believe, is sufficient to require the invalidation of the Act of 1860. But when taken cumulatively, they demonstrate beyond all doubt that the statute, as now written and enforced, is so lacking in procedural due process that it is patently unconstitutional.

The foregoing defects make it easily possible that a person entirely innocent of wrongdoing in fact can be punished (and have a court "pass sentence" upon him). Beyond this, the statute by its terms contemplates the imposi-

12. For a correct analysis of these practical procedural aspects, see Judge Flood's opinion, 29a, *infra.*

13. Compare *Tot v. United States,* 319 U. S. 463 with *Leland v. Oregon,* 343 U. S. 790.

tion of this penalty upon a person who has been acquitted of the only crime with which he has been charged. This in itself is contrary to fundamental fairness.

B. The Act of 1860 Violates Due Process Because It Imposes Punishment (Whether or Not We Characterize It as "Criminal Liability") on Men Who Are Admittedly Innocent in the Eyes of the Law. This Is Abhorrent to the Basic Principles of Justice as Guaranteed by the Fourteenth Amendment.

A determination as to the limits of due process is aided by reference to the law elsewhere: is this practice followed, or, conversely, condemned, in jurisdictions which share the same basic concepts of criminal justice? See *Leland v. Oregon*, 343 U. S. 790, 798;[14] *Rochin v. California*, 342 U. S. 165; *Adamson v. California*, 332 U. S. 46.

At common law—in England in the 17th and 18th centuries—costs lay where they fell. Innocent defendants were never required to pay their prosecutors' costs. See, Archbold, *Pleading and Evidence in Criminal Cases* 161 (1834 ed.); 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); Note, *Criminal Costs Assessment in Missouri—Without Rhyme or Reason*, 1962 WASH. U. L. Q. 76-77. In England today, not only are costs not imposed upon acquitted defendants, but *precisely the opposite*, there is provision for the award of expenses properly incurred in carrying on their defense. Costs in Criminal Cases Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c.48 (1952). See Note, 1962 WASH. U. L. Q. 76, 77-78.

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14. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934)." *Leland v. Oregon, supra* at 798.

The federal procedure permits costs to be taxed only in the case of a conviction: 28 U. S. C. § 1918 (1958). Also, several states have statutory provisions on the subject (full texts of which are attached hereto as Appendix G), all of which protect acquitted defendants from the imposition of costs. The Act of 1860 reflects a practice which has been condemned in other states. See, *e.g., Arnold v. State,* 76 Wyo. 445, 306 P. 2d 368 (1957); *Childers v. Commonwealth,* 171 Va. 456, 198 S. E. 487 (1938); *State v. Brooks,* 33 Kan. 708, 7 Pac. 591 (1885); *Biester v. State,* 65 Neb. 276, 91 N. W. 416 (1902). Although none of these cases specifically involved a statute or order imposing costs on an acquitted defendant—for, we believe, in no state has the practice ever been authorized—nevertheless, in each case the court, by the way of dicta, indicated that costs should never be so imposed. As indicated, Note 7, *supra,* the practice is constitutionally forbidden in at least four states.

We believe no other jurisdiction imposes costs on acquitted defendants. Our research—portions of which is indicated above—is admittedly not exhaustive; but we find no authority for the practice in any of the encyclopedias or treatises: see, *e.g.,* 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); 14 Am. Jur., *Costs* § 107 (1938); 20 C. J. S., *Costs* § 437 (1940). All of the authorities found either prevented or condemned the practice.

It is said, however, that in Pennsylvania "at common law" the defendant bore the costs of a prosecution. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 126, 127 (Pa. Supreme Ct. 1818); Kessler, *Criminal Procedure in Pennsylvania* 235 (1961). Beyond Justice Gibson's statement in *Tilghman, supra,* upon which later dicta seem to rely, we have found no case decided prior to the enactment of statutes dealing with the subject which demonstrate the common law practice in Pennsylvania. The history in Pennsylvania indicates that its adoption may even have been accidental; in any event, the history hardly supports the idea that the practice was carefuly judged as fair.[15]

15. For a history of the Act, see Note 7, *supra.*

III. The Act of 1860 Singles Out Defendants Acquitted of a Misdemeanor by a Jury and Fastens a Peculiar Penalty Upon Them—Yet Other Pennsylvania Costs Statutes Specifically Protect Defendants Acquitted of Both Felonies and Summary Offenses From Similar Penalties; Such Is a Denial of the "Equal Protection of the Laws" Guaranteed by the Fourteenth Amendment.

The Act of 1860 permits a jury to assess costs upon a defendant acquitted of the commission of a misdemeanor. Pa. Stat. Ann. tit. 19, § 1221, as construed, directs that no costs shall be imposed on a defendant found innocent in a summary proceeding. Pa. Stat. Ann. tit. 19, § 1223, which derives from the Act of 1797, 4 Laws of Pa. 204 (Smith 1810) wherein it had been declared that the imposition of *any* costs on an acquitted defendant was "unjust," deals with felonies and provides that costs, in the case of acquittals, shall be paid only by the county.

The distinction between the "improper conduct" which leads to an indictment for a misdemeanor and which, under the Act of 1860, permits the imposition of punishment, i.e., costs, and the "improper conduct" which leads to an indictment for a felony or a summary offense and which, under 1221 or 1223, is not punishable by the imposition of costs in the event of an acquittal, is simply not rational. Such distinction is not the result of the application of a reasonable standard.

The peculiar penalty for "improper conduct" which is sanctioned by the Act of 1860 is not, vis-à-vis Pa. Stat. Ann. tit. 19, § 1221 and § 1223, justified by practical exigencies nor by the dictates of experience. This is not a matter of "degrees of evil" which were held constitutional in *Truax v. Raich*, 239 U. S. 33. This penalty is the product of historical accident and only serves to impose upon a person suspected of a lesser offense a burden from which a person charged with a more serious offense or, indeed, a less seri-

ous one has been expressly relieved. Such is an unreasonable classification, a denial of the equal protection of the laws, and is, therefore, unconstitutional. *Skinner v. Oklahoma,* 316 U. S. 535.

CONCLUSION.

For the reasons stated above, this Court should note its probable jurisdiction, require briefs on the merits and oral argument and reverse the judgment and order of the Supreme Court of Pennsylvania.

Respectfully submitted,

PETER HEARN,
JAMES C. N. PAUL,
PAUL J. MISHKIN,
Attorneys for Appellant.

January 15, 1965.

APPENDIX "A".

MAJORITY OPINION OF THE SUPREME COURT OF PENNSYLVANIA.

Mr. Justice Musmanno and Mr. Justice Jones did not take part in the consideration of the case.

Opinion by Mr. Justice Roberts, July 6, 1964:

In the context of current interpretations of the Constitutions of the United States and of this Commonwealth, we are asked to declare invalid the Act of March 31, 1860, P. L. 427, § 62, 19 P. S. § 1222,[1] which permits the imposition by a jury of costs on defendants acquitted of misdemeanors.[2] The Act specifically provides: "In all

1. This Act was taken from the Act of Dec. 8, 1804, 4 Sm. 204, §§ 1, 2, and the Act of April 12, 1859, P. L. 528.

2. The Superior Court, in this case, observed that the validity of the Act has been sustained by it and by this Court on numerous occasions. Judge Woodside, for the majority, noted:

"The validity of a statute imposing costs upon an acquitted defendant was before the Supreme Court in Commonwealth v. Tilghman, 4 S. & R. 127 (1818), where Mr. Justice Gibson prophesied that the provision in the Act of 1804 would 'prove highly beneficial' even though it, 'at first view, may appear unjust.' One hundred thirteen years later Judge Keller, speaking for this Court, said of the provision imposing costs upon acquitted defendants, 'However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of this Commonwealth and it works substantial justice.' Commonwealth v. Cohen, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931). Between these two decisions the statutory provision here questioned was examined by the appellate courts, and its use aproved many times: Harger v. Commissioners of Washington Co., 12 Pa. 251 (1849); Baldwin v. Commonwealth, 26 Pa. 171 (1856); Commonwealth v. Kennan, 67 Pa. 203, 207, 208 (1871); Linn v. Commonwealth, 96 Pa. 285 (1881). In Commonwealth v. Tremeloni, 93 Pa. Superior Ct. 432 (1927) this Court reversed the court below which had set aside the costs imposed upon a defendant by a jury." (Footnote omitted.)

Also see *Wright v. Commonwealth*, 77 Pa. 470 (1875).

prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return or verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

Appellant was charged with pointing a deadly weapon at another person in violation of § 716 of The Penal Code, June 24, 1939, P. L. 872, 18 P. S. § 4716. The evidence was that, apparently under the apprehension that persons on a neighbor's land were about to trespass upon his own property, he fired a starting pistol in their direction. The would-be trespassers, at that time, had no way of knowing that appellant was firing blanks or that the weapon was other than a live revolver. The jury acquitted appellant of the substantive offense [3] but imposed the costs of prosecution upon him.

Appellant moved to be relieved of payment of the costs, which motion was granted by the trial judge. In doing so, the court declared the Act of 1860 unconstitutional and set aside the verdict insofar as it imposed upon appellant the "penalty" of the payment of costs.

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3. However, appellant's conduct apparently did constitute an assault.

The Commonwealth appealed to the Superior Court, which reversed and reinstated the "sentence." This Court granted allocatur.

Appellant makes the general constitutional challenge that the Act violates basic principles of fairness, both procedurally and substantively. The statute is attacked as vague and lacking in sufficient standards. It is urged further that the Act is an improper delegation of legislative power in contravention of Article II, § 1, of the Constitution of Pennsylvania. It is also contended that the Act violates the equal protection clause of the Fourteenth Amendment to the Constitution of the United States because it does not treat those acquitted of felonies or of summary offenses in like manner.

At the outset, it is important to note, as did the Superior Court, that the Act of 1860 is not a penal statute, some language in the very early cases notwithstanding. Imposition of costs is not part of any penalty imposed even in those cases where there is a conviction. ". . . [A] direction to pay costs in a criminal proceeding is not part of the sentence, but is an incident of the judgment: Commonwealth v. Dunleavy, 16 Pa. Superior Ct. 380. And see Commonwealth v. Moore, 172 Pa. Superior Ct. 27, 92 A. 2d 238. Costs do not form a part of the penalty imposed by statutes providing for the punishment of criminal offenses, Commonwealth v. Cauffiel, 97 Pa. Superior Ct. 202, and liability for the costs remains even after a pardon by the executive: Cope v. The Commonwealth, 28 Pa. 297; County of Schuylkill v. Reifsnyder, 46 Pa. 446." *Commonwealth v. Soudani*, 193 Pa. Superior Ct. 353, 355-56, 165 A. 2d 709, 711 (1960).

While it is true that the statute empowers the court to "pass sentence to that effect," this authority must be read with the language which immediately precedes it. So considered, it is clear that the term "sentence" is not used in its strictly technical sense as the formal pronouncement to

the accused of the legal consequences of his guilt.[4] It merely means an adjudication by the court in compliance with the statute after the jury's finding that the prosecutor or the defendant shall pay costs. That this is the legislative meaning of the phrase "pass sentence" is made unmistakably evident by the discretion granted to the jury to impose costs not only upon the acquitted defendant but also upon the prosecutor who is not even charged with a criminal offense. Moreover, should the grand jury return a bill "ignoramus," it shall also determine whether the county or prosecutor shall pay the costs.

We conclude, therefore, that the phrase "pass sentence," as used in the statute, is synonymous with the authority of the court to assess a judgment for costs in civil cases.[5]

Just as costs in civil cases may be imposed whenever permitted by statute, not as a penalty but rather as compensation to a litigant for expenses,[6] so, too, the costs

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4. "Sentence" may be defined: "The judgment formally pronounced by the court or judge upon the defendant after his conviction in a criminal prosecution, awarding the punishment to be inflicted. Judgment formally declaring to accused legal consequences of guilt which he has confessed or of which he has been convicted. The word is property confined to this meaning." Black, Law Dictionary 1528 (4th ed. 1951).

5. We do not have before us the question of the validity of that portion of the Act which calls for enforcement of the collection of the costs by imprisonment. It is sufficient to note that where a defendant *refuses* to pay the costs or to provide security therefor, his confinement is the result of the court's exercise of its power to punish contempt. As the Superior Court observed: "But if he is unable to pay the costs, he may be exonerated from paying them by proceeding under the insolvency act. This procedure is available to him not only after he has been committed to prison for failure to pay the costs, but also before he is committed. Thus, an acquitted defendant upon whom the costs have been imposed may be discharged from paying them without having to undergo any actual imprisonment. Kishbaugh's Petition, 135 Pa. 468, 19 A. 1063 (1890); In re: Collection of Fines, Cost, etc., 76 Pa. D. & C. 456, 469, 471 (1950)."

6. See *Steele v. Lineberger*, 72 Pa. 239 (1872); 1 Laub, Pennsylvania Keystone, Costs § 1 (1964).

under this statute represent compensation or partial reimbursement to the county for expenses incurred in a prosecution.

The civil character of costs is further supported by the authority given the jury to fasten costs upon a prosecutor whose unjustified conduct brings about a prosecution. In this event, the jury may assess all, part or none of the costs against him. If, however, the jury determines that neither the prosecutor nor the defendant were at fault, the jury may place all of the costs upon the county. If the jury determines that both were at fault, it may divide the costs between the prosecutor and the defendant equally or in any other proportion.

Nothing more is here involved than utilization of the machinery of the courts of quarter sessions for the disposition of costs.

"The imposition of costs upon a successful litigant is not unknown to the courts of Pennsylvania. In equity, the Orphans' Court, and upon appeal to the appellate courts, costs may be placed where justice requires them to be, even though they be placed upon the successful party. The practice and procedure of placing costs upon an acquitted defendant who is not completely innocent or without fault has been a salutary and effective way of administering the criminal law." *Commonwealth v. King,* 33 Pa. D. & C. 2d 235, (1963).

Turning then, directly to the first issue presented, appellant asserts that the Act is vague and lacking in appropriate standards. For support, appellant relies on decisions wherein penal statutes have been declared invalid. We do not here have such a statute. As already noted, the imposition of costs is, in reality, civil in nature. Nor do we have a statute which attempts to create an offense without properly defining the prohibited (or required) conduct. Neither is the statute otherwise vague and uncertain or defective in failing to apprise an accused of the acts the

results of which may justify imposition of costs. See *Chester v. Elam,* 408 Pa. 350, 184 A. 2d 257 (1962).

The provisions of the statute constitute clear notice and inform both prosecutor and defendant that the matter of costs may be determined incidentally to the basic issue of guilt or innocence. The Superior Court quite properly observed: "Of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury."

Assuming that there must exist a standard by which a defendant will know that he may incur costs, we are satisfied that the Act of 1860 fulfills this requirement. It is clear that the Act cannot be read by itself, but must be considered together with the particular statute creating the substantive offense and all the circumstances presented to the jury. A defendant on trial for a misdemeanor knows the charge he must meet and knows that, in the event of a conviction, he may have to pay costs as well. By the Act of 1860, a defendant is also placed on notice that if acquitted, he may have to pay all or part of the costs of the prosecution.

By judicial interpretation, the courts of this Commonwealth for over a century and a half have applied a standard of reasonableness on the issue of costs. The standard is essentially no different from that applied by a court of equity and adequately meets the objections raised by appellant. If a defendant is charged with a misdemeanor and is brought to trial, and a prima facie case is made out, but the jury finds only reprehensible acts or misconduct which fall short of the offense charged, he may be held responsible for the costs of prosecution if his misconduct gave rise to it.[7]

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7. As a practical matter, if the Commonwealth fails to establish a prima facie case, the defendant may be discharged on demurrer and no costs may be imposed upon him.

A defendant charged with a misdemeanor also knows that even if the Commonwealth proves its case against him, a jury may still act in his favor by returning a verdict of "not guilty and pay the costs" plus the silent admonition "but don't do it again." Indeed, it is often his fervent hope that the jury will so find.

Judge J. Frank Graff, a highly experienced and very able trial judge, in passing upon this issue in *Commonwealth v. King, supra,* 33 D. & C. 2d at (1963), appropriately held: "The standard by which costs may be placed upon the defendant must arise out of the particular case upon trial. As a factual matter, from vast experience in the trial of cases, juries are reluctant upon occasions to adjudge a defendant guilty, and seek the alternative of not making a record against him, but requiring him to pay the costs, because of his reprehensible conduct. The Constitution does not require impossible standards; all that it requires is that the language conveys sufficiently definite warning as to the prescribed conduct, when measured by common understanding and practice: Roth v. United States, supra [354 U. S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)] . . . ."

We are satisfied, therefore, that the Act of 1860, as construed and applied, comports with due process of law and is constitutionally acceptable and fundamentally fair.

Appellant contends that the statute denies procedural due process because the only *hearing* contemplated is the trial of the substantive offense and there is not opportunity to "defend" on the issue of costs. By this argument, appellant concedes that there is a hearing afforded, but apparently believes that the Act should provide for a separate hearing on the matter of costs. The trial on the substantive offense offers ample opportunity to defend on the basis that defendant's conduct warrants neither a verdict of guilty nor imposition of costs. In the language of the Superior Court: "He has an opportunity to be heard on the question of costs. The decision of the jury is based

upon evidence heard by it. The defendant has a right to question the charge of the court on the question of costs. He has the right to subsequently challenge the amount of the costs taxed, and to challenge any arbitrary verdict by the jury in imposing the costs upon him."

We also find no merit in appellant's argument that the Act of 1860 is an unconstitutional delegation of legislative power to the judiciary. We are in full accord with the Superior Court's treatment of that issue: "It is obvious that in authorizing the disposition of costs, the legislature has not delegated the power to the jury to make a law, but only the power to determine some fact or state of things upon which the law makes its action depend. This it may do. Locke's Appeal, 72 Pa. 491, 498 (1873); Nester Appeal, supra, 187 Pa. Superior Ct. 313, 316, 144 A. 2d 623 (1958). It is not an exercise of a legislative power by the judiciary for it, through a jury, to dispose of the costs in accordance with a statutory provision, but it would be an unconstitutional assumption of a legislative power by the judiciary were the courts to ignore the statute and dispose of costs contrary to its provisions."

Finally, appellant urges that there is no rational basis for the imposition of costs on a defendant acquitted of a misdemeanor when one acquitted of an unfounded summary offense [8] or a felony [9] is immune from this burden. Consequently, appellant contends the Act of 1860 denies him equal protection of the law.

The Superior Court appropriately answered: "The separation of crimes into these classes and the application of different rules to the different classes has been so uniformly recognized and so firmly established in our law that the validity of legislation dealing with these classes separately need no longer be examined. Although the classification of particular crimes by the legislature may not always

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8. Act of Sept. 23, 1791, 3 Sm. L. 37, § 13, 19 P. S. § 1221.

9. Act of March 31, 1860, P. L. 427, § 64, 19 P. S. § 1223.

appear consistent, the separation of crimes into these classes and the application of different rules to each class is a matter for the legislature and its exercise of that power in separating crimes for the payment of costs is not a violation of the constitution. A classification may be discriminatory and not unconstitutional if any state of facts can [reasonably] be conceived that would sustain it. Jones & Laughlin Tax Assessment Case, 405 Pa. 421, 436, 175 A. 2d 856 (1961)."

In the instant situation, it appears that felony prosecutions are of such public importance that the Commonwealth is willing to bear the costs thereof. As to summary offenses, there is no jury which may impose costs.

Classification is a task exclusively for the Legislature. Our only inquiry is to determine whether a classification is patently arbitrary and utterly lacking in rational justification. *Milk Control Commission v. Battista,* 413 Pa. 652, 198 A. 2d 840 (1964). The classification created by the Act of 1860 does not violate this standard, and it must be permitted to stand.

Appellant has failed to meet his heavy burden of proving that the Act of 1860 clearly, palpably and plainly violates the Constitution. *Milk Control Commission v. Battista,* supra.

We share the Superior Court's concluding comment: "The statutory provision here attacked has thrice been enacted by the legislature; it has twice been held constitutional by the Supreme Court; it has been examined, tested, construed and applied for a century and a half; it is believed by many able trial and appellate court judges to do substantial justice; it constitutes a practical and realistic answer to the problem of costs. We can find no reason that would justify our holding it unconstitutional."

The order of the Superior Court is affirmed.

APPENDIX "B".

DISSENTING OPINION IN THE SUPREME COURT OF PENNSYLVANIA.

MR. JUSTICE COHEN:

I would adopt the dissenting opinion of Judge FLOOD, 202 Pa. Superior Ct. 310, 196 A. 2d 189 (1963), and reverse the judgment of the Superior Court.

APPENDIX "C".

MAJORITY OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

OPINION BY WOODSIDE, *J.*, December 12, 1963

This is an appeal by the Commonwealth from an order of the Court of Quarter Sessions of Chester County vacating a sentence to pay the costs of a criminal prosecution. The sentence had been imposed upon a defendant after a jury had found him not guilty of the misdemeanor with which he was charged, but had directed him to pay the costs of prosecution.

The defendant was charged with wantonly pointing and discharging a firearm in violation of The Penal Code of June 24, 1939, P. L. 872, § 716, 18 P. S. § 4716.

The legislature has provided for the disposition of costs in misdemeanor cases by providing, inter alia, that ". . . in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; . . ." Act of March 31, 1860, P. L. 427, 445, § 62, 19 P. S. § 1222. This was a reenactment of a substantially similar provision contained in the Act of December 7, 1804, 4 Smith's Laws 204, which was a temporary act, "continued and made perpetual" by an act passed March 29, 1809, 5 Smith's Laws 48. Thus, the statutory law of this Commonwealth has permitted the imposition of costs upon acquitted defendants for over a century and a half.

The court below found that the above provision of the Act of 1860 permitting the imposition of costs upon an acquitted defendant was unconstitutional for a variety of

reasons. The court in its opinion suggested that the statutory provision is unconstitutionally vague; that it is an unconstitutional delegation of legislative power; that it violates the doctrine of fundamental fairness; that it affords no hearing that it is a denial of the equal protection of the law; that it does not require proof beyond a reasonable doubt; that it provides for an unreasonable classification; and that it is an instrument of oppressive cruelty. To our knowledge, no court has ever found a Pennsylvania statute in such flagrant violation of the Constitution! If the statute were so flagrantly unconstitutional, it would indeed be a sad commentary upon the scores of appellate court judges who have examined the provision and the hundreds of trial judges who have applied it without seeing in it any of the infirmities conceived by the court below.

The validity of a statute imposing costs upon an acquitted defendant was before the Supreme Court in Commonwealth v. Tilghman, 4 S. & R. 127 (1818), where Mr. Justice Gibson prophesied that the provision in the Act of 1804 would "prove highly beneficial" even though it, "at first view, may appear unjust." One hundred thirteen years later Judge Keller, speaking for this Court, said of the provision imposing costs upon acquitted defendants, "However anomalous the course may appear to jurisdictions unfamiliar with our procedure, it is the law of this Commonwealth and it works substantial justice." Commonwealth v. Cohen, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931).[1] Between these two decisions the statutory provision here questioned was examined by the appellate courts, and its use approved many times: Harger v. Commissioners of Washington Co., 12 Pa. 251 (1849); Baldwin v. Commonwealth, 26 Pa. 171 (1856); Commonwealth v. Keenan, 67 Pa. 203, 207, 208 (1871); Linn v. Commonwealth, 96 Pa. 285 (1881). In Commonwealth v. Tremeloni, 93 Pa.

1. Few students of Pennsylvania courts would fail to include Chief Justice Gibson and President Judge Keller among the greatest half dozen appellate court judges of this Commonwealth.

Superior Ct. 432 (1927) this Court reversed the court below which had set aside the costs imposed upon a defendant by a jury.

In addition to the above cases which affirmed the imposition of costs upon acquitted defendants, other appellate court cases have recognized the legality of the provision. For examples see, County of Wayne v. Commonwealth, 26 Pa. 154 (1856)); Commonwealth v. Kocher, 23 Pa. Superior Ct. 65 (1903); Berks County v. Pile, 18 Pa. 493 (1852). The provision here questioned was examined and applied in scores of lower court cases, including Commonwealth v. King, — D. & C. 2d —, decided this year.[2]

Our Supreme Court has passed upon the constitutionality of the provision of the Act of 1860 imposing costs upon an acquitted defendant. In Wright v. Commonwealth, 77 Pa. 470 (1875) [3] the appellant, who had been acquitted of a misdemeanor but sentenced to pay the costs, contended that § 62 of the Act of March 31, 1860, P. L. 427, 445, supra, was unconstitutional. The Supreme Court rejected the contention and affirmed the sentence imposing the costs upon the defendant. In the argument before us it was suggested that cases decided prior to the 14th Amendment to the Federal Constitution and prior to the adoption of our Constitution of 1874 are of little authority in presently considering the constitutionality of the statutory provision here being attacked. The argument is not pertinent for our Supreme Court has upheld the constitutionality of the questioned statutory provision *after* the adoption of Pennsylvania's present constitution and *after* the adoption of the 14th Amendment to the Federal Constitution.

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2. The opinion in this case was written by President Judge J. Frank Graff, one of the most revered trial judges of this Commonwealth with over 39 years judicial experience, specially presiding in Allegheny County and sitting with two other able and experienced trial judges, Judges Samuel Weiss and Lloyd Weaver. The defendant's brief on the question of costs filed in that case appears to be identical with the defendant's brief filed with us.

3. No reference to this case is made in the opinion of the court below or in the briefs of the parties.

The Supreme Court has sustained the validity of the Act of 1804 and the Act of 1860. When the validity of a statute is attacked and a decision rendered sustaining it, there is a presumption that all existing reasons for declaring the act unconstitutional were considered and deemed insufficient. Keator v. Lackawanna County, 292 Pa. 269, 272, 141 A. 37 (1928); Dole v. Philadelphia, 337 Pa. 375, 379, 11 A. 2d 163 (1940); Nester Appeal, 187 Pa. Superior Ct. 313, 319, 144 A. 2d 623 (1958).

As the Supreme Court has twice passed upon the constitutionality of the very provision here questioned, the court below and this Court have no standing to overrule that Court's holding. Ordinarily, we would rest our decision on Wright v. Commonwealth, supra, without further comment. However, the appellee has suggested that "no one has heretofore challenged the constitutionality under present day constitutional concepts of Pa. Stat. Ann. tit. 19 § 1222." Of course, the constitutionality of the provision *has* been challenged and its validity upheld by the Supreme Court of Pennsylvania, so we must assume that counsel is asking us to apply to the statute a new test based upon "present day constitutional concepts," which, he says, "accord a fuller measure of protection to accused persons." It is not clear to what extent this Court is being asked to ignore existing decisions of our Commonwealth's highest court, but it is clear that counsel is suggesting that the legislature has less power to deal with matters of this nature today than it did when "old" concepts of the constitution existed. But, consider what one of the most distinguished proponents of the "present-day concept" said *this year* on the question of declaring unconstitutional a state act which made it a misdemeanor to carry on a business theretofore considered to be legal. Mr. Justice Black, in speaking for at least eight members of the Supreme Court of the United States, said that that Court has "returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the

judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U. S. 726, 730, 83 S. Ct. 1028 (1963). An examination of 7 P. L. E. Constitutional Law § 17 and cases there cited will demonstrate how far our own courts have gone in applying this rule.

The defendant in this case has a heavy burden to set aside the verdict of his peers based upon a statute of the legislature. As stated by Mr. Justice Cohen in the case of Realty Corp. v. Philadelphia, 390 Pa. 197, 205, 134 A. 2d 878 (1957), "No act or portion thereof should be declared unconstitutional unless 'it violates the Constitution clearly, palpably, plainly; and in such manner as to leave no doubt or hesitation in our minds.' Kelley v. Baldwin, 319 Pa. 53, 54, 179 A. 736 (1935); Sablosky v. Messner, 372 Pa. 47, 59, 92 A. 2d 411 (1952)." "The burden of proof is upon the one who claims that the statute is unconstitutional." Commonwealth v. Bristow, 185 Pa. Superior Ct. 448, 458, 138 A. 2d 156 (1958).

We know of no Pennsylvania statute whose validity has been attacked after so many years of constant application. Since the Act of 1804, two new constitutions have been adopted and scores of amendments have been made to the present constitution.[4] There have been over a hundred regular sessions of the legislature and a score of special sessions since the Act of 1804 was enacted. Hundreds of judges have examined and passed upon the statutory provision here questioned. As stated by Mr. Justice Agnew, and repeated by the Supreme Court in Booth & Flinn, Ltd. v. Miller, 237 Pa. 297, 306, 85 A. 457 (1912) concerning a somewhat similar situation, "The continued exercise of the power . . . cannot be accounted for except on the ground

4. The appellee argues that we should declare the questioned provision unconstitutional because the constitutions of a few other states prohibit the practice. If the statute were unconstitutional in the manner appellee suggests these states would not need a specific constitutional prohibition. The fact that our constitution, twice rewritten and frequently amended, does not prohibit the imposition of costs is a strong argument and the people of this Commonwealth have joined with their legislature and their courts in approving the practice.

that all men, learned and unlearned, believed it to be a legitimate exercise of the legislative power. This belief is further strengthened by the fact that no judicial decision has been made against it."

A construction of the constitution adopted and acted upon by the legislature and acquiesced in by the people for many years is entitled to great weight. Summit Hill Borough, 240 Pa. 396, 399, 87 A. 857 (1913); 7 P. L. E. Constitutional Law § 12. It is true that mere passage of time does not give validity to an unchallenged statute, but the fact that a statute has been in effect for many years, even when unchallenged, is a strong argument in favor of validity. James v. Public Service Commission, 116 Pa. Superior Ct. 577, 177 A. 343 (1935) 7 P. L. E. Constitutional Law § 20. The provision questioned here has not only been in existence since the earliest days of our Commonwealth but it has been twice challenged and its validity sustained.

The questioned provision of the Act of 1860 has been equated in the opinion of the court below and throughout the brief of the appellee with the practice which this Court condemned in Commonwealth v. Franklin, 172 Pa. Superior Ct. 152, 92 A. 2d 272 (1952). Prior to the decision in the Franklin case, which held the practice unconstitutional, certain judges, almost exclusively in Philadelphia, frequently held a defendant in bail to keep the peace after he had been acquitted by a jury. Few of the defendants thus held could raise the bail, and as a result they spent months and often years in jail. From 1939 to 1949, 478 acquitted defendants in Philadelphia served a total of over 600 years in prison, an average of well over a year each. The practice was unknown to most of the areas of the Commonwealth, and generally shocked "up state" judges who encountered it in Philadelphia.

There is no comparison between the statutory provision here questioned and the practice condemned in the Franklin case. Here the General Assembly of Pennsyl-

vania thrice authorized the imposition of costs by a jury upon defendants found not guilty; the practice condemned in the Franklin case was not based upon an act of our legislature, but was a procedure adopted by the courts from an English Statute, 34 Edw. III c 1, enacted in 1360. Here a jury composed of the defendant's peers directed the imposition of the costs; the practice condemned in the Franklin case flouted the findings made by a jury of the defendant's peers. Here the purpose and usual effect of the procedure is limited to the recovery of expenses for which the defendant's conduct was at least partially responsible; the practice in the Franklin case and its practical effect was to commit acquitted defendants to jail for long periods of time. Here the appellate courts of this Commonwealth considered and approved the practice in numerous cases; the Franklin case was the first, at least since the 14th Amendment to the Federal Constitution, to examine the constitutionality of a practice which had never been specifically sanctioned by our legislature.

Counsel for the appellee with light regard for the legislature and the courts suggests that the words "or the defendant" were inserted in the Act of 1804 "either by mistake or without clear recognition of their ramifications";[5] that in 1860 the legislature inserted the provision "without consideration of its merits";[6] that Mr. Justice Gibson was not familiar with the common law of Pennsylvania on imposition of costs when he wrote about it in 1818, that he misled subsequent judges and textbook writers, and that the imposition of costs upon acquitted

5. He ignores that the identical provision was examined by the legislature of 1809 which decided that it should be continued and made perpetual.

6. In 1949 a legislative Committee on Penal Laws and Criminal Procedure of the Joint State Government Commission, after careful consideration of the then existing laws governing procedures in criminal matters, retained the provision here under review in its proposed recodification. See Senate Bill 988, 1949 Session, § 1601. Serving on that committee as legislators were five present members of the judiciary: Judges Lord, Brown, Rahauser, Readinger, and Woodring.

defendants was unknown except in Pennsylvania.[7] As we view this case, the common law relating to costs prior to 1804 is no longer important. If other states have different ideas on the disposition of costs in misdemeanor cases, that is an argument to be addressed to the legislature and not the courts. The argument that the legislatures of 1804, 1809 and 1860 did not know what they were doing deserves no reply.

We cannot follow the defendant's argument that the questioned statutory provision constitutes an unlawful delegation of legislative power. It is obvious that in authorizing the disposition of costs, the legislature has not delegated the power to the jury to make a law, but only the power to determine some fact or state of things upon which the law makes its action depend. This it may do. Locke's Appeal, 72 Pa. 491, 498 (1873); Nester Appeal, supra, 187 Pa. Superior Ct. 313 316, 144 A. 2d 623 (1958). It is not an exercise of a legislative power by the judiciary for it, through a jury, to dispose of the costs in accordance with a statutory provision, but it would be an unconstitutional assumption of a legislative power by the judiciary were the courts to ignore the statute and dispose of costs contrary to its provisions.

The defendant contends that it is an unconstitutional classification to separate the crimes into summary convictions, misdemeanors and felonies for the purpose of determining in which cases the costs may be placed upon defendants and in which cases they may not be placed upon them. The separation of crimes into these classes and the

7. On the early law of this Commonwealth on this point see Commonwealth v. Tilghman, supra, 4 S. & R. 127 (1818); Berks County v. Pile, supra, 18 Pa. 493, 496 (1852); Long v. Lancaster County, 16 Pa. Superior Ct. 413, 417 (1901); Commonwealth v. Kocher, supra, 23 Pa. Superior Ct. 65, 67, 68 (1903); Kessler on Criminal Procedure in Pennsylvania, Vol. 1, page 235, and cases there cited. On whether this provision has been unique to Pennsylvania see: State v. Butcher, 1 Del. Cases 334 (1793); State v. Miller, 1 Del. Cases 512 (1814); Delaware Constitution of 1792, Art. VIII, § 8; Keith v. State, 27 Ga. 483 (1859); State v. Hargate, 1 N. C. 196 (1800).

application of different rules to the different classes has been so uniformly recognized and so firmly established in our law that the validity of legislation dealing with these classes separately need no longer be examined. Although the classification of particular crimes by the legislature may not always appear consistent, the separation of crimes into these classes and the application of different rules to each class is a matter for the legislature and its exercise of that power is separating crimes for the payment of costs is not a violation of the constitution. A classification may be discriminatory and not unconstitutional if any state of facts can be conceived that would sustain it. Jones & Laughlin Tax Assessment Case, 405 Pa. 421, 436, 175 A. 2d 856 (1961).

Contrary to the defendant's contention, the statutory provision here questioned meets the requirements of the due process clause of Art. 1, § 9 of the Constitution of this Commonwealth and the 14th Amendment to the Constitution of the United States. The defendant in a criminal case is presumed, as all of us are, to know the law. Thus, when brought to trial on an indictment charging a misdemeanor, the defendant has notice that the jury may impose the costs of prosecution upon him even if he is acquitted. He has an opportunity to be heard on the question of costs. The decision of the jury is based upon evidence heard by it. The defendant has a right to question the charge of the court on the question of costs. He has the right to subsequently challenge the amount of the costs taxed, and to challenge any arbitrary verdict by the jury in imposing the costs upon him.

The defendant assumes that the imposition of costs under the Act of 1860, supra, is the infliction of punishment upon a person for undefined conduct. The imposition of costs on either the prosecutor or defendant is not punishment for the commission of a crime. Imposition of costs does not form a part of the penalty of even guilty defendants. Commonwealth v. Soudani, 193 Pa. Superior

Ct. 353, 356, 165 A. 2d 709 (1960); Commonwealth v. Cauffiel, 97 Pa. Superior Ct. 202, 205 (1929); Commonwealth v. Moore, 172 Pa. Superior Ct. 27, 29, 92 A. 2d 238 (1952). It is true that a person sentenced to pay the costs in a criminal case may be committed to prison for refusing to pay them. But if he is unable to pay the costs, he may be exonerated from paying them by proceeding under the insolvency act. This procedure is available to him not only after he has been committed to prison for failure to pay the costs, but also before he is committed. Thus, an acquitted defendant upon whom costs have been imposed may be discharged from paying them without having to undergo any actual imprisonment. Kishbaugh's Petition, 135 Pa. 468, 19 A. 1063 (1890); In re: Collection of Fines, Cost, etc. 76 Pa. D. & C. 456, 469, 471 (1950).

The costs of a case do not always fall upon the unsuccessful party. There are situations in divorce cases, support cases, equity cases and orphans' court cases where costs, in whole or in part, may be imposed upon the party successful in the action.

There are many crimes made punishable by the legislature which have never been defined by it. The legislature looks to the common law, i.e., court decisions, to define many serious offenses for which it provides punishment. The Act of 1860, supra, is as specific as any statute can be concerning the right of the jury to dispose of costs in a misdemeanor case, the manner in which the jury may divide the costs and the parties upon whom it may impose the costs. Of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury. The imposition of costs other than upon the county must be based upon conduct by either the prosecutor or the defendant or both which is related to the case. It is not necessary, indeed it would be impossible, for the legislature to detail all the circumstances and conditions under which the jury should or should not impose the

costs upon the parties. The legislature need not set forth with the same particularity the circumstances under which a jury, under the control of the court, may exercise the power given to it, as it must set forth the area within which a governmental board or commission must act. Nester Appeal, supra, 187 Pa. Superior Ct. 313, 320, 144 A. 2d 623 (1958).

The statute itself does not produce unconstitutional unfairness. Should the verdict in a particular case be arbitrary or should there be a gross abuse of discretion in the imposition of the costs upon either the prosecutor or the defendant, the court has the power to relieve the party from such arbitrary or unjust verdict. Commonwealth v. Cohen, supra, 102 Pa. Superior Ct. 397, 401, 157 A. 32 (1931); Dunn Appeal, 191 Pa. Superior Ct. 346, 349, 156 A. 2d 349 (1959). The public is frequently put to the cost of trying a defendant because of reprehensible conduct by him. When the jury is warranted by the evidence and authorized by the legislature to collect these costs from such defendants there is no reason why the will of the legislature and the jury should be set aside when it is not arbitarary or unwarranted under the evidence.

Those who think it is inconsistent and basically unfair to place the costs upon acquitted defendants insist upon cataloguing all conduct as either wholly right or wholly wrong. But most human conduct does not fit into these absolutes. Any effort to show life in black and white, without gray, fails to accurately portray the truth. Judges, jurors, and legislators for over a century and a half have recognized the "substantial justice" of this provision for the simple reason that in practice it produces results that are fair and just.

There are endless situations in which the jury might find that the defendant's improper conduct was responsible for the prosecution even though he was not guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly

committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fist fight were guilty of conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs; or where the defendant in a drunken driving" case drank and then drove while in that twilight zone that exists at some stage of the drinking; or where defendants charged with adultery registered at a hotel as husband and wife but convinced the jury that they had not actually committed adultery. As stated in Commonwealth v. Franklin, supra, 172 Pa. Superior Ct. 152, 193, 92 A. 2d 272 (1952), "A most important portion of the administration of our system of criminal justice is the fact that the jury in subtle ways may temper the rigidity of our criminal code in the application of the letter of the law to particular cases and may perhaps thereby mitigate the rigors of the law."

If the test of constitutionality is to be based solely upon a concern for the accused, that concern may not be well placed, for there are undoubtedly many cases where a verdict of "not guilty but pay the costs." would have been a verdict of guilty had there been no compromise position for the jury to take. See discussion by Judge Burton R. Laub of Erie County in his Pennsylvania Trial Guide § 171.

The defendant in this case was charged with violation of The Penal Code of June 24, 1939, P. L. 872, § 716, 18 P. S. § 4716, supra, which provides that "Whoever playfully or wantonly points or discharges a gun, pistol or other firearm at any other person, is guilty of a misdemeanor . . ." From the part of the record before us, it appears that a woman, her child and her dog were visiting next door to the defendant. The dog started toward the defendant's property, the child followed it, and the mother pursued both of them to keep them from the defendant's property. The defendant presumably seeing the child coming toward his property rushed from his home with a pistol and fired it in

the direction of the people, all of whom remained on the neighbor's property. Whether or not this conduct constitutes a violation of § 716 is not before us. The jury acquitted the defendant apparently believing that the defendant had fired a blank from a starting revolver which was not aimed directly at the people in the neighbor's yard. The people in whose direction the defendant fired had no way of telling whether he was shooting blanks or just failing in an attempt to hit them. The conduct of the defendant was improper and such as to warrant bringing the prosecution. He was fortunate to have been acquitted, but substantial justice was done to all concerned by the imposition of the costs upon him.

The statutory provision here attacked has thrice been enacted by the legislature; it has twice been held constitutional by the Supreme Court; it has been examined, tested, construed and applied for a century and a half; it is believed by many able trial and appellate court judges to do substantial justice; it constitutes a practical and realistic answer to the problem of costs. We can find no reason that would justify our holding it unconstitutional.

Order reversed, sentence reinstated.

Flood, J. files a dissenting opinion.

APPENDIX "D".

DISSENTING OPINION IN THE SUPERIOR COURT OF PENNSYLVANIA.

FLOOD, *J.*

Section 62 of the Act of March 31, 1860, P. L. 427, 19 PS § 1222, insofar as it authorizes the jury to impose costs upon an acquitted defendant and subjects him to commitment to jail upon failure to pay them, is a penal statute. Yet it does not say what conduct shall subject the acquitted defendant to this penalty. Consequently, when the jury determines that an acquitted defendant shall pay the costs and the court proceeds, in accordance with the statute "forthwith" to "pass sentence to that effect and order him to be committed to the jail of the county until the costs are paid, unless he give security . . ." there is a violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States and Art. I, § 9, of the Constitution of Pennsylvania. *Chester v. Elam,* 408 Pa. 350, 184 A. 2d 257 (1962).

The statute before us is a penal statute. It was so denominated by Mr. Justice GIBSON in *Commonwealth v. Tilghman,* 4 S. & R. 127 (1818) in considering the Act of 1804, of which § 62 of the Act of 1860 is a faithful and literal reproduction. "I grant, that a statute imposing costs, is penal in its nature and must be construed strictly . . . ." This is the language of GIBSON, J., in the opinion in the *Tilghman* case which is relied upon, mediately or immediately, by all the subsequent cases holding these two acts valid. In a later case, the Supreme Court said: "The statute which enables a grand or petit jury to punish with costs is penal, and to be strictly construed." *Clemens v. The Commonwealth,* 7 Watts 485 (1838).

It is a penal statute because under it costs can be imposed only upon a defendant who has been indicted.

It is penal in that it may result in a jail commitment, such commitment being mandatory under the statute if the

acquitted defendant does not pay the costs at once or give security to pay them within ten days. In this it is unlike statutes imposing costs in civil cases, such costs, in the absence of fraud being enforceable only by execution against property. *S. S. Pierce's Appeal,* 103 Pa. 27 (1883).

The legislature which adopted it evidently considered it penal because it was enacted as part of an act entitled "An Act to Consolidate, Revise and Amend the Laws of this Commonwealth relating to Penal Proceedings and Pleadings."

Nor is the conclusion that this statute is penal in any way weakened by the fact that the imposition of costs, following a judgment of conviction, not acquittal, has been held for some purposes to be an incident of the judgment, rather than punishment for the crime. This apparently stems from *Commonwealth v. Dunleavy,* 16 Pa. Superior Ct. 380 (1901), which held that a suspended sentence on condition that costs be paid was not a sentence so as to destroy the court's power later to revoke the suspension and impose a prison sentence. Cases like *Commonwealth v. Soudani,* 193 Pa. Superior Ct. 356, 165 A. 2d 90 (1960), holding the costs following a conviction are not part of the sentence, but are an incident of the judgment, cannot apply to defendants found not guilty. Costs on the defendant cannot possibly be "incident" to a judgment following a not guilty verdict. The statute provides that when the jury shall upon acquittal determine that the prosecutor or the defendant shall pay the costs, "the court shall forthwith pass *sentence* to that effect." The sentence as to an acquitted defendant can only be that he pay the costs. This is the actual judgment and not an incidnet to the judgment. The cases holding that the imposition of costs is an incident to a judgment of sentence upon a guilty verdict lend no support to the proposition that the imposition of costs on an acquitted defendant is something other than punishment.

It is to be noted that even in civil cases the Supreme Court said, again speaking through Gibson, J.: "At com-

mon law, there were no costs expressly by name, but the plaintiff, where he failed, was punished in amercement *pro falso clamore,* and the defendant, where the judgment was against him in *miserecordiá cum expensis litis,* for his unjust detention of the plaintiff's right; and this was the foundation of the statutes which afterwards gave costs by name; so that costs, in their origin, were rather a punishment of the party paying, than a recompense to the party receiving them." *Musser v. Good,* 11 S. & R. 247, 250 (1824).

No amount of dialectic can alter the fact that this statute provides that an accused may go to jail without having been convicted of any crime—indeed after having been acquitted of the only crime of which he was charged. This is depriving him of his liberty without due process of law under the cases which have superseded the authority of those relied upon by the majority.

This is the clear import of the decision of the United States Supreme Court in 1939 in *Lanzetta v. New Jersey,* 306 U. S. 451, the decision of this court in 1952 in *Commonwealth v. Franklin,* 172 Pa. Superior Ct. 152, 92 A. 2d 272, and the decision of the Supreme Court of Pennsylvania in 1962 in *Chester v. Elam,* 408 Pa. 350, 184 A. 2d 257.

In *Lanzetta* the Supreme Court of the United States held that a statute violated due process which made it criminal to be a "gangster", which was defined as "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State. . . ." The court held that the interpretation of the statute by the highest court of New Jersey did not save it from being too indefinite and too vague to enforce within the requirements of due process. The court speaking through Mr. Justice BUTLER further said: "It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the lan-

guage later used by the court. . . . The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment."

The resemblance to the statute before us is obvious. The statute here condemns no act or omission. The majority points to the common law crimes, punishable under our statutes but defined only by the common law, i.e., decisions of the courts. The precise common law definitions of such crimes, e.g., murder, rape, burglary or arson, could not contrast more sharply than they do with the majority's attempt to define what is punishable here—conduct "related to the prosecution", "reprehensible conduct", conduct "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal division of the costs", conduct "in the twilight zone between drunken driving" and something less, or something reprehensible that does not constitute a crime, such as registering falsely at a hotel as husband and wife.

In *Commonwealth v. Franklin*, supra, we held that the Statute of Edward III, authorizing the court to hold under bond to keep the peace "all them that be not of good fame", was unconstitutionally vague.

Finally in *Chester v. Elam*, supra, our Supreme Court said that the phrase "disorderly conduct" was unconstitutionally vague under both the Federal and Pennsylvania Constitutions, quoting from *Lanzetta v. New Jersey*, supra, as follows: "A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of law." What the statute before us forbids under penalty of imposition of costs upon an acquitted defendant, with imprisonment for nonpayment, is something undefined in the statute whose meaning can only be guessed at by men of common intelligence.

Only one of the appellate cases relied upon or cited by the majority (*Wright v. Commonwealth*, 77 Pa. 470 (1875)) may have considered the statute in the light of the Fourteenth Amendment, and it is not at all clear that even this case did so. The statement of the case (presumably by the reporter) is that the defendant assigned for error, among other things, that the provision we are considering in § 62 of the Act of 1860, as well as § 1 of the Act of 1864, under which the defendant was indicted, was unconstitutional. While the opinion did discuss briefly the constitutionality of § 1 of the Act of 1864, as to § 62 of the Act of 1860 the court said only: "The objection to the imposition of costs, on the ground that a verdict of not guilty was rendered, is equally futile. We must presume the jury had a good reason for doing so, arising in the conduct of the defendant. And even if the indictment had been so defective that no conviction could have rested upon it, still the right to impose costs existed. This was expressly decided, and good reasons stated for the decision, in Commonwealth v. Tilghman, 4 S. & R. 127." This opinion thus refers back to and relies upon the *Tilghman* case, supra, decided in 1818, and makes no reference to the Fourteenth Amendment to the Constitution of the United States or to the Constitution of Pennsylvania.

It must not be forgotten that a violation of due process can occur as a result of jury action as well as through the action of a judge. Such a violation occurs in cases in which a guilty verdict is based upon evidence obtained by illegal search and seizure, or in a trial for felony in which the defendant is not represented by counsel and has not intelligently waived such representation, or when there is any other unwaived violation of due process in the course of the trial.

This defendant has not been found guilty of a crime, or of refusing to pay for the machinery of justice which he has set in action improperly, or of some violation of another's rights which the other has vindicated by winning

a law suit against him. He is not being asked to pay because of some duty he has voluntarily assumed by marriage or parenthood, nor is he asked to pay indirectly the cost of having an inheritance or other property right vindicated.

The majority suggests that it is not necessary to give notice to the defendant of what he is to be tried for, since we can rely upon his presumed knowledge of the law that under the Act of 1860 costs may be imposed upon him if he is acquitted. But for what? The act does not say. Is it, as the majority and some other opinions indicate, because he has done "something reprehensible", or because he may be guilty even though found not guilty. Against what is he to defend? Is he to be compelled to put in evidence his good character and thus give the prosecution the right to bring into evidence any previous offenses?

The majority say he has the opportunity to be heard upon his liability for costs, but about what? Is the district attorney to be permitted to discuss "reprehensible conduct" other than the crime charged, and is his counsel thus going to be compelled to scatter his defense so as to meet this indefinite charge as well as the crime for which he is indicted? Is the district attorney to be permitted to tell the jury that they may impose costs even if they have a reasonable doubt of his guilt? Surely this riddles the safeguard which the presumption of innocence and the Commonwealth's burden of proof purports to throw around the defendant. How could anything be put to the jury on this subject without discussing his record or the lack of it?

As the court below stated: "Trial Judges, as in this case, have consequently instructed juries in accordance therewith substantially in the language of the Tilghman case. There the Supreme Court, speaking through Mr. Justice Gibson, had said the Act was aimed at a defendant '. . . acquitted of actual crime, but whose conduct may have been reprehensible in some respects, or whose inno-

cence may have been doubtful . . . The judgment is not on the indictment but on something collateral to it. The defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though on account of something, of which he was not indicted, some impropriety of conduct, or ground of suspicion, which the verdict of the jury has fastened on him . . . I grant, that a statute imposing costs, is penal in its nature . . . There may, I apprehend, be acts, such as certain kinds of fraud, that are offensive to morality, that nevertheless are not indictable . . . Wherever misconduct may be fairly imputed, either to a prosecutor or a defendant, they respectively become obnoxious to this kind of legal animadversion, although neither guilty of, nor technically charged with a crime . . . ."

The fact that Mr. Justice GIBSON found that the provision for imposition of costs upon an acquitted defendant "at first view, may appear unjust" and Judge KELLER said that it "may appear anomalous" indicates the difficulty these eminent judges found in sustaining this provision even without reference to the Fourteenth Amendment. I cannot agree that they would have sustained it today in the light of the Fourteenth Amendment, as interpreted in *Lanzetta v. New Jersey*, supra, *Elam v. Chester*, supra, *Commonwealth v. Franklin*, supra. Under these authorities, this statute, insofar as it authorizes the imposition of costs upon acquitted defendants, clearly violates due process. The order of the court below should be affirmed.

ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA.

Filed December 12, 1963.

Order reversed, sentence reinstated.

APPENDIX "E".

OPINION OF THE TRIAL COURT.

GAWTHROP, P. J., January 12, 1963.—Defendant was charged in the above two bills of indictment with unlawfully and wantonly pointing and discharging a firearm at each of two persons. At trial, a verdict of not guilty was directed and returned on bill no. 226, and the jury placed the costs of prosecution on the county. On bill no. 225, the jury returned a verdict of not guilty but ordered defendant to pay the costs. Pursuant thereto, he was ordered to pay the costs forthwith or give security to pay the same within ten days and stand committed until he complied therewith. Having so posted security, thereafter defendant, who was not represented by counsel at or after trial, having refused the court's offer to appoint counsel to represent him, with the assistance of the district attorney's office on request of the court, filed a motion to be relieved of payment of costs on the grounds that imposition thereof upon him was contrary to law, an abuse of the jury's discretion and against the weight of the evidence.

Defendant argued his motion in propria persona and, while the court held the matter under consideration, counsel entered their appearance for defendant, filed a motion for reargument which was granted, and thereafter ably argued the matter and filed an extensive and well-considered brief. The matter is now before us for decision, and, after careful consideration, the motion must be granted.

Defendant attacks the constitutionality of the Act of March 31, 1860, P. L. 427, sec. 62, 19 PS § 1222, on the four grounds that: (1) It is void for vagueness; (2) it improperly delegates legislative power; (3) it violates basic principles of due process of law; and (4) it discriminates against defendants in misdemeanor cases.

Our research and that of counsel has discovered no Pennsylvania decision prior to the first statute on the subject, the Act of 1791, infra, holding that acquitted defendants in criminal cases bore the costs of prosecution, and it appears that the contrary was true at English common law: Stephen, History of the Criminal Law of England, vol. I, pages 498-499; Bishop, New Criminal Procedure, vol. 2, §§ 1313, 1317. In Commonwealth v. Tilghman, 4 S. & R. 126, however, our Supreme Court in 1818 sustained the validity of the Act of December 7, 1805, 4 Sm. L. 204, permitting imposition of costs on acquitted defendants in misdemeanor cases, and, in so doing, stated that in Pennsylvania "at common law" [illegible] a defendant was liable for the costs of prosecution. Apparently no appellate decision has since stated otherwise. Kessler, Criminal Procedure in Pennsylvania, page 235, repeats the same Pennsylvania common law rule, citing Commonwealth v. Johnson, 5 S. & R. 195, and Strein v. Ziegler, 1 W. & S. 259.

Our statute law on the subject has not been entirely consistent as an analysis of it demonstrates. The earliest statute was the Act of September 23, 1791, P. L. 37, 43 and 44, an act to "Supplement the Penal Laws," which declared, inter alia, at page 43, that in cases where grand juries ignored bills of indictment and, at page 44, where any person was brought before a court and charged with crime and the charge "shall appear unfounded," costs should fall on the county. There followed the Act of March 20, 1797, P. L. 281, the preamble of which recited as its purpose:

"Whereas . . . persons, against whom indictments are presented by the grand inquests . . . are afterwards acquitted by a petit jury . . . And whereas, by the existing laws, a party so acquitted is equally liable to costs of prosecution as if he were convicted, *which operates injustice, and a punishment to the innocent: For remedy whereof,* . . . " it enacted that if defendant were acquitted by a

petit jury of *any indictable offense* the costs should be paid out of the county stock. (Italic supplied.)

Both acts show a clear legislative intent to relieve *all* acquitted defendants of payment of costs, and ". . . changed the odious common law principle which left the accused to pay the costs, whether convicted or acquitted; . . .": Strein v. Ziegler, supra, at 260.

Then followed the Act of December 7, 1805, 4 Sm. L. 204, the act considered in Commonwealth v. Tilghman, supra. Its preamble recited that "the laws obliging the respective counties to pay the costs of prosecutions, in *all criminal cases,* where the accused is or are acquitted, *have a tendency to promote litigation;* inasmuch as they enable restless and turbulent people to harass the peaceable part of the community, with trifling, unfounded, or malicious prosecutions at the expense of the public . . ." (Italics supplied.)

Although its stated purpose was to discourage unfounded prosecutions, its terms went further. Section 1 provided that, except in felony cases, where a grand jury ignored a bill of indictment, it should decide and certify whether the county or the prosecutor should pay the costs, but that in all cases of acquittal by a petit jury they should determine by their verdict whether the county, the prosecutor, or the *defendant or defendants* should pay the costs. Section 2 provided that where any jury determined that a prosecutor should pay the costs, the court should pass sentence to that effect by committing him to jail until the costs were paid, unless he gave security to pay them within ten days. So, while reciting a purpose of discouraging unfounded prosecutions and relieving the public of the costs in such cases, the act revived the very Pennsylvania "common law" practice of imposing costs upon acquitted defendants which the Acts of 1791 and 1797 had abolished and the latter had declared to be an "injustice" and a "punishment of the innocent." At the same time, it would appear that in felony cases the relief granted by the Act of 1791 continued to apply, as it does today.

Whether the words "or the defendant or defendants" were included deliberately or by inadvertence in the Act of 1805, they were incorporated again in the same language in its reenactment by the Act of 1860, supra, and have ever since been applied in misdemeanor cases. Trial judges, as in this case, have consequently instructed juries in accordance therewith substantially in the language of the Tilghman case. There, the Supreme Court, at page 128, speaking through Mr. Justice Gibson, had said the act was aimed at a defendant ". . . acquitted of actual crime, but whose conduct may have been reprehensible in some respects, or whose innocence may have been doubtful . . . The judgment is not on the indictment but on something collateral to it. The defendant is not *punished* for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though, *on account of something* of which he was not indicted, some *impropriety of conduct,* or *ground of suspicion,* which the verdict of the jury has fastened on him . . . I grant that a statute imposing costs is *penal* in its nature . . . There may, I apprehend, be acts, such as certain kinds of fraud, that are offensive to morality, that nevertheless are not indictable . . . Wherever *misconduct* may be fairly imputed, either to a prosecutor or a defendant, they respectively become obnoxious to this kind of legal animadversion, *although neither guilty of, nor technically charged with a crime.*" (Italics supplied.)

We are asked to reconsider the validity of a statute passed upon with approval by our Supreme Court in 1818. That decision would be binding authority upon us except that here, for the first time, substantial constitutional questions are raised in the light of more recent decisions of the Supreme Court of the United States and of the Supreme Court of Pennsylvania which we believe require us to reexamine the matter. Cf. Commonwealth v. Franklin, 172 Pa. Superior Ct. 152.

The imposition of costs upon an acquitted defendant under the Act of 1805 was a punitive measure enforceable

by imprisonment: Commonwealth v. Tilghman, supra; Commonwealth v. Harkness, 4 Binney 194. Its subsequent reenactment in the same language by the Act of 1860 indicates its interpretation has been approved by the legislature. This compels the same construction under the later act: Stautory Construction Act of May 28, 1937, P. L. 1019, sec. 52(4), 46 PS § 552(4); Parisi v. Philadelphia Zoning Board of Adjustment, 393 Pa. 458; Bogdan v. School District of Coal Township, 369 Pa. 147.

But to be constitutional, such a statute must contain clear standards by which to measure the conduct punished by it. If it is so vague that men of common intelligence must guess at its meaning and differ as to its application, it violates the first essential of due process: Lanzetta v. New Jersey, 306 U. S. 451; Chester v. Elam, 408 Pa. 350; Commonwealth v. Franklin, supra. The vagueness may be from uncertainty in regard to persons within the scope of such an act, or in regard to the applicable tests to ascertain guilt: Winters v. New York, 333 U. S. 507. Fundamental fairness requires notice of what to avoid. If the purpose of the act is not disclosed, punishment may not be imposed for conduct which, at the time of its commission, was not forbidden by law in the understanding of persons seeking to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the concept of "due process of law." Where such notice is lacking, it is said the statute is void for indefiniteness: dissenting opinion of Mr. Justice Frankfurter in Winters v. New York, supra. The act in question is totally lacking in any tests or standards by which men of common intelligence can determine what conduct will result in the imposition of costs and allows unbounded latitude for difference of opinion as to the circumstances in which it may be applied to acquitted defendants.

Similarly, for the reasons stated in Commonwealth v. Franklin, supra, the act is also unconstitutional as an improper delegation of legislative power in contravention of

article III, section 1, of the Constitution of Pennsylvania. Any statute which vests in a person or body of persons, without any standards except his or their own judgment, the power of supplying, or giving force to, or suspending its terms is unconstitutional. Judicial power is exercised only for the purpose of giving effect to the will of the legislature, which is the will of the law and not of any individual or group of persons: Commonwealth v. Franklin, supra, at 182. The act delegates to a jury the power to inflict punishment without any fixed tests or standards to guide it in such circumstances as it may see fit to do so. In so doing, it is an unconstitutional delegation of legislative power.

Defendant asserts the act violates both procedural and substantive "due process of law" in contravention of the Fourteenth Amendment to the Constitution of the United States, as that concept has more recently developed as a doctrine of "fundamental fairness." In a procedural sense, it violates that concept because it lacks standards defining, and for determination of guilt of, conduct for which the punishment may be imposed. It gives a defendant no notice of the misconduct upon which the punishment depends or of his right to defend against it. It affords no hearing on the issue of costs but only on the charge contained in the indictment to which the evidence is limited. Finally, it does not require proof beyond reasonable doubt of the misconduct underlying imposition of the penalty: In re Oliver, 333 U. S. 257; Winters v. New York, supra. Thus, it contravenes procedural due process.

Substantively, the act seems to violate "due process" by imposing a punishment or penalty upon defendant found to be innocent under the law and is a denial of "equal protection of the laws", both contrary to the Fourteenth Amendment. The fundamental unfairness of punishing the innocent is self-evident. Apparently, the practice never existed at the English common law, and, so far as we can determine, it does not exist in any other State of the

United States. It is specifically condemned in the Constitutions of Florida, North Carolina and Mississippi, and has been criticized in principle in Pennsylvania by Fuller, P. J., in Commonwealth v. Webster, 23 Luz. 359, as an "instrument of oppressive cruelty" which should not be tolerated in a civilized age. The courts of four other States have indicated that costs should not be imposed on acquitted defendants. Cf. Arnold v. State, 76 Wyo. 445, 306 P. 2d 368; Childers v. Commonwealth, 171 Va. 456; State v. Brooks, 33 Kan. 708; Biester v. State, 65 Neb. 276, 91 N. W. 416.

Finally, the act discriminates between innocent defendants in misdemeanor cases and those in cases of felonies generally. Cf. Act of 1860, P. L. 427, sec. 64, 19 PS § 1223, which places costs on the county in cases of acquittal of felonies. It has been said ". . . the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and so fast as its means allow": Buck v. Bell, 274 U. S. 200, 208. Presumably, the improper conduct giving rise to felony prosecutions is of higher degree than in misdemeanor cases, so that no reason or justification appears to support the distinction. The result is to impose a penalty on one accused but acquitted of the lesser, while relieving one accused but acquitted of a higher, degree of crime. This is an unreasonable classification and a denial of equal protection of the laws: Skinner v. Oklahoma ex rel. Williamson, 316 U. S. 535.

We consider the imposition of costs upon acquitted defendants in misdemeanor cases is, under the modern concepts of "due process of law" and "fundamental fairness," equally as offensive to the Fourteenth Amendment to the Constitution of the United States as was the requirement of entry of security after acquittal on penalty of commitment in default thereof, which was struck down in Commonwealth v. Franklin, supra. What was there said, at page 194, ff., applies equally here, especially: "The evil [of the statute] we are considering is that it is in reality

an effective power to punish in virtually unrestrained form." Under the more recent decisions of the courts of the United States and of this Commonwealth, section 62 of the Act of 1860, P. L. 427, 19 PS § 1222, is unconstitutional and void insofar as it permits imposition by the verdict of a jury of the costs of prosecution on acquitted defendants in misdemeanor cases.

Defendant's motion to be relieved of the costs of prosecution is granted. The verdict, insofar as it imposes upon defendant the penalty of the payment of costs of prosecution, is set aside as being contrary to law. The sentence imposed upon defendant that he pay said costs forthwith or give security to pay the same within ten days and to stand committed until he had complied therewith is vacated.

APPENDIX "F".

PORTION OF CHARGE OF THE COURT DEALING WITH COSTS.

GAWTHROP, *P. J.:*

If, but only if, you find not guilty verdicts, members of the jury, do you dispose of the costs of prosecution. Now, with regard to the Bill No. 226, where I have directed that you find a verdict of not guilty, you will have to dispose of the costs of prosecution. Whatever you may determine as to the other bill of indictment, if you find the defendant not guilty on the Bill No. 225, that is, the one involving the incident with the Bauman boy, then and only then will you consider the costs of prosecution on that bill.

Costs of prosecution may be disposed of in three ways where misdemeanor charges are found unproved by a jury. The charge made in each of these bills of indictment, as to all counts, is a misdemeanor charge. In felony cases, that is, more serious offenses such as rape, robbery, burglary and so forth, the jury has nothing to do with disposing of the costs in case of an acquittal. In misdemeanor cases it is the jury's duty to dispose of costs if it finds not guilty verdicts. If you find the defendant not guilty on any bill of indictment you must dispose of the costs of prosecution in one of three ways. They may be placed either upon the defendant or upon the prosecutor, or upon the county. Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction, the costs of prosecution may be placed upon him if his misconduct has given rise to the prosecution. If you find the defendant not guilty and find that he should not pay the costs as defend-

ant, you may consider whether or not you will put the costs of prosecution on the prosecutor.

Now, in the bill of indictment involving the incident with Mrs. Arters, Evelyn A. Arters is endorsed as the prosecutrix on the bill of indictment. In the bill charging the affair involving the Bauman boy, Elizabeth J. Fuhrman is endorsed on the bill as the prosecutrix. You may find that those persons are or are not the actual prosecutors, as the evidence may indicate to you, in either or both of the bills, if you find that someone else actually is the prosecutor. In any event, if you find the defendant not guilty on either of these bills, or both, as to any not guilty verdict, you may consider placing the costs of prosecution on the prosecutor if you decide the defendant should not pay them, if you find that the prosecution, instead of being brought in good faith for the reasons set forth in the charge, was on the contrary brought out of malice or some ill-will, or other improper motive; and if you find that neither the defendant nor the prosecutor should pay the costs of prosecution, in case of a not guilty verdict, then you may place the costs in the only other place where they may go, and that is on the County of Chester.

I repeat, you do not come to the question of disposing of the costs unless and until you find a verdict of not guilty. Now, under these rather strange circumstances, you will have to dispose of the costs of prosecution on Bill No. 226 in any event because I have directed that you return a verdict of not guilty on that bill. As to Bill No. 225, involving the Bauman boy, you won't reach that question of costs unless and until you first find the defendant not guilty. If you do find him not guilty on that bill, then you will consider the costs of prosecution.

(Remaining portion of Charge of Court not transcribed.)

(The Jury retired but returned for further instructions as follows:)

THE COURT: Members of the jury, you have asked this question of the Court in writing: "If a verdict of innocence is arrived at may we then divide the costs of prosecution between the defendant and the prosecutor? If so, may we decide how the costs should be divided?"

I will answer those questions in the order in which you have asked them. If you find a verdict of not guilty on either or both bills of indictment, and you will recall that we have directed you to find a not guilty verdict on one of the bills involving Mrs. Arters' matter, if you find a verdict of not guilty on any bill of indictment the costs on that bill of indictment may be divided between the defendant and the prosecutor, naming the prosecutor—and that is important if your verdict is to be effective—in such proportion as you determine to be appropriate. Our Act of Assembly provides that that may be done.

That answers, I think, both of your questions. In other words, first, you may, in case of a not guilty verdict, divide the costs between the prosecutor and the defendant, on that or any such bill of indictment. And in so doing you must name the prosecutor to make your verdict effective in that respect. You may divide the costs between the defendant and the prosecutor in such proportion as to you seems proper under the circumstances.

Does that answer your question?

FORELADY: Yes.

THE COURT: Very well. Will you please retire to your jury room and determine upon your verdict, having in mind that if in the bill of indictment involving the boy Donald Bauman you arrive at a not guilty verdict, you will therefore, on both bills of indictment, have to dispose of the costs of prosecution in accordance with the instructions I have given you.

Will you please return to your jury room.

(End of Charge on costs.)

APPENDIX "G".

MASS. ANN. LAWS ch. 278, § 14 (1956):

> "No prisoner or person under recognizance, acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees or for any charge for subsistence while he was in custody."

MICH. STAT. ANN. tit. 28, § 28.1057 (1948):

> "No prisoner or person under cognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office, or for any charge of subsistence while he was in custody."

N. Y. CODE OF CRIMINAL PROCEDURE § 719:

> "When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged; and if the court certify, upon its minutes, or the jury find that the prosecution was malicious or without probable cause, the court must order the prosecutor to pay the costs of the proceedings. . . ."

OHIO REV. CODE ANN. § 2947.23 (1953):

> "In all criminal cases . . . the judge or magistrate shall *include in the sentence* the costs of prosecution and render a judgment against the defendant for such costs." (Emphasis added.)

VA. CODE § 19.320 (1960):

"In every criminal case the clerk of the . . . court in which the accused is *convicted* . . . shall, as soon as may be, make up a statement of all the expenses incident to the prosecution . . . and execution for the amount of such expenses shall be issued and proceeded with . . . in favor of the Commonwealth against the accused. . . ."

WASH. REV. CODE ANN. tit. 10, § 10.46.200 (1881):

"No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or for want of prosecution, shall be liable for any costs or fees of any officer or for any charge of subsistence while he is in custody. . . ."

APPENDIX "H".

ORDERS, JUDGMENTS AND DECREES APPEALED FROM.

ORDER OF TRIAL COURT:

"Defendant's motion to be relieved of the costs of prosecution is granted. The verdict, insofar as it imposes upon defendant the penalty of the payment of costs of prosecution, is set aside as being contrary to law. The sentence imposed upon defendant that he pay said costs forthwith or give security to pay the same within ten days and to stand committed until he had complied therewith is vacated." (January 12, 1963)

ORDER OF SUPERIOR COURT OF PENNSYLVANIA:

"Order reversed, sentence reinstated." (December 12, 1963)

ORDER OF SUPREME COURT OF PENNSYLVANIA:

"The order of the Superior Court is affirmed." (July 6, 1964)

IN THE

Supreme Court of the United States

October Term, 1964

No. 47

JAY GIACCIO,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee

On Appeal from the Supreme Court of Pennsylvania.

MOTION TO DISMISS APPEAL OR LACK OF JURISDICTION BY APPELLEE

WALTER E. ALESSANDRONI
Attorney General of Pennsylvania
GRAMER MURDOCK
Deputy Attorney General
Main Capitol
Harrisburg, Pa.
A. ALFRED DELDUCO
District Attorney of Chester Co.
JOHN S. HALSTED
Assistant District Attorney
Court House
West Chester, Pa.
Attorneys for Appellee

Mutsville Printing Company, Law Printers, 301-309 Lockhart Street, Sayre, Pa.

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TABLE OF CITATIONS

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1964
No. 831

Jay Giaccio,

Appellant

v.

Commonwealth of Pennsylvania,

Appellee

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS APPEAL

The Commonwealth of Pennsylvania, Appellee, moves your Honorable Court to dismiss the above-captioned appeal for the reason that no substantial federal question is presented.

WALTER E. ALESSANDRONI
GRAEME MURDOCK
A. ALFRED DELDUCO
JOHN S. HALSTED
Attorneys for Appellee

QUESTIONS PRESENTED

Appellant's appeal should be dismissed for lack of jurisdiction because:

1. The Act of 1860 as construed by the Supreme Court of Pennsylvania is not vague or uncertain and no substantial federal question is presented.

2. Appellant's procedural due process argument raises no substantial federal question.

3. It is not a violation of the equal protection clause of the Fourteenth Amendment to treat misdemeanors differently from other classes of offenses.

STATEMENT OF THE CASE

The Defendant, Jay Giaccio, was indicted and tried on bills of indictment 225 and 226, September Sessions 1961 in the Court of Quarter Sessions of Chester County. Each of the above bills charged the misdemeanor of unlawfully and wantonly pointing and discharging a firearm at each of two different persons. This is a violation of the Act of June 24, 1939, P. L. 872, Section 716 (18 P.S. 4716).

At the trial of the case the Defendant represented himself, having refused the trial Court's offer to appoint counsel for him. The substance of the Defendant's defense was that the only firearm he had pointed or discharged at anyone was a blank starter pistol.

After hearing the evidence and due deliberation the jury returned a verdict of not guilty on each bill of indictment and ordered the County to pay the costs on Bill Number 226 and directed the defendant to pay the costs of prosecution on Bill Number 225.

Thereafter, with the assistance of the District Attorney's office, a petition to be relieved from the payment of costs was filed on behalf of the Defendant on April 21, 1962.

A hearing was had on Defendant's motion on April 27, 1962 and on June 13, 1962, James C. N. Paul, Esquire, and Peter Hearn, Esquire, appeared as counsel for the Defendant and filed a petition for rehearing. The petition was granted and argument had at

which time Defendant's counsel asserted the constitutional objections which are the basis for the present appeal.

On January 12, 1963, President Judge Gawthrop filed an opinion in the Court of Quarter Sessions of Chester County holding so much of Section 62 of the Act of 1860, P. L. 375 (19 P.S. 1222), as gave the jury power to place the costs on acquitted defendants in misdemeanor cases unconstitutional and ordered the sentence imposing costs vacated.

Thereafter the Commonwealth filed an appeal from that order and certiorari was directed to the Clerk of the Court of Quarter Sessions, Chester County, February 28, 1963.

On December 12, 1963, the Superior Court of Pennsylvania with only one judge dissenting reversed the order of the trial Court and reinstated the jury's determination as to the payment of costs.

The matter was then taken on appeal to the Supreme Court of Pennsylvania and on July 6, 1964 that court affirmed the order of the Superior Court with only one justice of the five participating in the decision dissenting.

Appellant then filed a Notice of Appeal to the Supreme Court of the United States.

The Appellant is not now and never has been confined.

ARGUMENT IN SUPPORT OF MOTION TO DISMISS APPEAL

I. The Act of 1860[1] as Construed by the Supreme Court of Pennsylvania Is Not Vague or Uncertain and No Substantial Federal Question Is Presented

The void for vagueness argument raised by Appellant is relevant only if the interpretation and construction placed on the statute by the Supreme Court of Pennsylvania is ignored. Such construction and interpretation by the highest state court cannot be ignored by this court. The statute must be given the same construction placed upon it by a state Supreme Court. *Bandini Petroleum v. Superior Court,* 284 U. S. 8; *Musser v. Utah,* 333 U. S. 95; *Beauharnais v. Illinois,* 343 U. S. 25.

A. As construed by the Pennsylvania Supreme Court the Act of 1860 is not a penal act.

It is clear that under the law of Pennsylvania the costs of prosecution placed upon a party form no part of the penalty. *Commonwealth v. Soudani,* 193 Pa. Superior Ct. 353, 165 A. 2nd 709 (1960). As it is pointed out in the opinion of the Supreme Court of Pennsylvania (*Commonwealth v. Giaccio,* 415 Pa. 139, 202 A. 2nd 55 (1964)), the fact that in applying the

[1] Act of March 31, 1860, P. L. 427; Pa. Stat. Ann. tit. 19, section 1222, hereinafter the Act of 1860.

statute the courts have used such terms as "guilty of misconduct", "sentence" or "penalty" does not make the act penal. It is obvious that such phrases are used in the broad, rather than literal or technical, sense. Accepting the Pennsylvania Supreme Court's characterization of the statute, it is clear that the Act of 1860 need not be tested by the more rigorous standards applied to a statute creating a new substantive crime. Liability for costs under the Act of 1860 follows rather than precedes the disposition of the substantive offense.

B. Whether civil or penal in nature, the Act of 1860 as interpreted by the State Courts provides sufficient standards to satisfy the constitutional requirements of the Fourteenth Amendment.

The Appellant would have this court consider the bare bones of the Act of 1860 as standing alone and undefined. This is erroneous. In considering the specificity of a statute, it is not to stand by itself but is to be considered as a "part of the whole body of common and statute law of (the) state and to be judged in that context". *Musser v. Utah,* supra, page 97. This is what the Pennsylvania Supreme and Superior Courts did and their construction should be accepted. *Bandini Petroleum Co. v. Superior Court,* supra.

As the Pennsylvania court points out in its opinion in this case, the provisions of the Act of 1860 with regard to the placement of costs in misdemeanor cases must be read in conjunction with the statute creating the substantive offense for which the defendant was prosecuted. A defendant is not arrested, indicted,

and tried for being guilty of "some misconduct". He is before the court for committing a statutorily well defined misdemeanor. The jury makes its determination limited by the strict rules of evidence applied to criminal cases. It is clear that as the Pennsylvania Courts construe the Act of 1860 "the costs of trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence before the jury". *Commonwealth v. Giaccio,* supra. Just as in the instant case Pennsylvania juries have been charged in accord with that interpretation.

There is no question that the Act of 1860 is flexible, but it is flexible only in that it applies to all types of misconduct which precipitates an indictment and trial for well-defined misdemeanors. It would be virtually impossible to construct a statute which would in detailed language cover every situation in which it might be desirable to relieve the community of the burden of costs where there has been an acquittal, so the Pennsylvania legislature has given the jury some guided discretion as to where to place the costs. The fact that the jury must judge the behavior of the defendant and the prosecutor is in no way fatal to this statute. *Nash v. U. S.,* 229 U. S. 373.

The Act of 1860 as construed by the state court and as applied by the jury is no more objectionable or vague than the statute and procedure approved by this court in *Roth v. U. S.,* 354 U. S. 496, where it was held reasonable for the jury to apply the common conscience of the community to limit the meaning of the words obscene and lewd in a federal ob-

scenity statute. In that case, as in the instant case, it is the jury's judgment as to whether the standard of behaviour for the community has been breached.

The impact of the Act of 1860 upon criminal defendants would not seem to have been nearly as burdensome as portrayed by Appellant when one considers that this act or a one similar has been in force in Pennsylvania since 1805 and it was not until the instant case that any constitutional objection was attempted to be raised against it.

A consideration of the common law roots of the Act of 1860 makes its provisions considerably less unique or shocking. At common law in Pennsylvania, the defendant though acquitted always paid the costs. *Commonwealth v. Tilghman*, 4 Sargeant and Rawle 126 (Pa. 1818). Contrary to present practice, at common law the state never paid the costs, *U. S. v. Gaines*, 131 U. S. CLXIX, Appx., 25 L. Ed. 733. The Act of 1860 creates no new liability or penalty but rather allows the jury to relieve defendants of a common law burden. There is no doubt that the Pennsylvania legislature has not gone as far as other states in relieving the common law rule but this is a matter for the legislature, not the courts.

II. Appellant's Procedural Due Process Argument Raises No Substantial Federal Question

Appellee believes that Appellant's procedural due process objections as they relate to vagueness and fair notice are covered in Part I of this brief. With regard to Appellant's objection that no separate hearing on the issue of costs is provided for by the Act of 1860, it is our belief that this objection was passed on by this court in *Lowe v. Kansas,* 163 U. S. 81. In that case this Court considered and approved a Kansas statute which allowed the jury to place the costs on the *prosecutor* in a criminal libel action without any separate hearing on the issue of costs. The Court in considering this question approved the state court's rationale that "the prosecuting witness was so connected with the state in the trial of the prosecution that he was not entitled to a separate trial by jury upon the question of liability of costs" (163 U. S. 82). It is submitted that the procedure under Act of 1860 provides ample opportunity for the defendant to be heard.

The trial court has the traditional common law power to set aside the jury's placement of costs on an acquitted defendant. *Commonwealth v. Bixon,* 67 Pa. Superior Ct. 554 (1917). Such power lodged in the courts provides an effective safeguard against capricious action by the jury. In addition, there is appeal from the action of the trial court as is so amply demonstrated by this case.

III. It Is Not a Violation of the Equal Protection Clause of the Fourteenth Amendment To Treat Misdemeanors Differently From Other Classes of Offenses

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It is submitted that the states have a wide latitude and discretion to classify and treat crimes and offenses. It would serve no purpose to belabor the obvious and it suffices to say that the historical and actual differences between misdemeanors and felonies justify a state's different treatment of them and such different treatment in no way violates the equal protection clause. *Skinner v. Oklahoma,* 316 U. S. 535. With regard to summary cases, no jury is present and the task of assigning costs is left to the Magistrate.

CONCLUSION

Because of the foregoing, it is respectfully requested that this Court should deny probable jurisdiction and dismiss the appeal in this matter.

Respectfully submitted,
WALTER E. ALESSANDRONI
GRAEME MURDOCK
A. ALFRED DELDUCO
JOHN S. HALSTED
Attorneys for Appellee

April 25, 1965

IN THE

Supreme Court of the United States

October Term, 1964.

No. [redacted] 47

JAY GIACCIO,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

On Appeal From the Supreme Court of Pennsylvania.

APPELLANT'S BRIEF IN REPLY TO MOTION TO DISMISS FOR LACK OF JURISDICTION BY APPELLEE.

PETER HEARN,
JAMES C. N. PAUL,
PAUL J. MISHKIN,
2001 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Penna. 19109,
Attorneys for Appellant.

International, 711 So. 50th St., Phila., Pa. 19143

IN THE

Supreme Court of the United States.

October Term, 1964

No. 831

JAY GIACCIO,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

APPELLANT'S BRIEF IN REPLY TO MOTION TO DISMISS FOR LACK OF JURISDICTION BY APPELLEE.

ARGUMENT.

Appellee, in its Motion to Dismiss Appeal for Lack of Jurisdiction, contends that this Court is bound by the Pennsylvania Supreme Court's "construction" that Fourteenth Amendment due process protections do not apply to the Act of 1860 because the Act is "civil" rather than "penal." To whatever extent this could have been argued feasibly before has now been concluded by *One 1958 Plymouth Sedan v. Pennsylvania,* — U. S. —, decided one week ago.

Appellee's other contentions have been discussed fully in Appellant's Jurisdictional Statement which is hereby affirmed in full and urged upon the Court.

CONCLUSION.

Appellant prays that the Court note its probable jurisdiction, require briefs and oral argument on the merits and reverse the judgment and order of the Supreme Court of Pennsylvania.

Respectfully submitted,

PETER HEARN,
JAMES C. N. PAUL,
PAUL J. MISHKIN,
Attorneys for Appellant.

May 6, 1965.

IN THE

Supreme Court of the United States

October Term, 1965.

No. 47.

JAY GIACCIO,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

On Appeal From the Supreme Court of Pennsylvania, Eastern District.

BRIEF OF APPELLANT.

PETER HEARN,
JAMES C. N. PAUL,
PAUL J. MISHKIN,
2001 Fidelity-Philadelphia Trust Bldg.,
Philadelphia, Penna. 19109,
Attorneys for Appellant.

International, 711 So. 50th St., Phila., Pa. 19143

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IN THE

Supreme Court of the United States

October Term, 1965

No. 47

JAY GIACCIO,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

BRIEF OF APPELLANT.

OPINIONS BELOW.

The majority and dissenting opinions of the Supreme Court of Pennsylvania (R. 47 and R. 56, respectively), are reported at 415 Pa. 139, 202 A. 2d 55 (1964). The majority and dissenting opinions of the Superior Court of Pennsylvania (R. 5 and R. 17, respectively) are reported at 202 Pa. Super. 294, 196 A. 2d 189 (1963). The opinion of the trial court (R. 35) is reported at 30 Pa. D. & C. 2d 463 (Q. S. Chester 1963).

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered on July 6, 1964 (R. 47). A Notice of Appeal to the Supreme Court of the United States was filed with the Supreme Court of Pennsylvania on October 2, 1964 (R. 57). On November 24, 1964, the Supreme Court of Pennsylvania granted an extension of time under Rule 13 to docket the appeal and file the Jurisdictional Statement until January 15, 1965 (R. 60-61). The Jurisdictional Statement was filed on January 15, 1965, and probable jurisdiction was noted on May 24, 1965 (R. 62), 381 U. S. 923. The jurisdiction of this Court rests on 28 U. S. C. § 1257(2).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

1. U. S. Constitution, Amendment XIV.

2. Act of March 31, 1860, P. L. 427, § 62; PA. STAT. ANN., tit. 19, § 1222:[1]

> "In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant, shall pay the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return of verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

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1. Hereinafter the "Act of 1860."

QUESTIONS PRESENTED.

Appellant was indicted for a misdemeanor and tried before a jury. He was acquitted. As a part of its verdict, however, the jury assessed the costs of prosecution in the amount of $230.95 against him pursuant to the Act of 1860.

The questions presented are substantially those affirmed by the trial court but subsequently rejected by two state appellate courts:

1. Is the Act of 1860 unconstitutionally vague, in violation of the due process clause of the Fourteenth Amendment of the United States Constitution, in that it permits punishment

(a) without any standards prescribed by the statute itself;

(b) on a finding that defendant has been guilty of "some misconduct" or "reprehensible misconduct" which "misconduct" is not otherwise defined or identified at any time, either prior to or during the criminal proceedings?

2. Does the combined effect of the procedural due process violations arising from operation of the Act of 1860 and the mere fact that the Act permits punishment of an innocent person, contrary to every other English speaking jurisdiction where the practice was found to have been considered, violate the fundamental fairness required of all criminal proceedings by the Fourteenth Amendment due process clause?

3. Does the Act of 1860 violate the "equal protection of the laws" embodied in the Fourteenth Amendment because it discriminates against defendants in misdemeanor cases by imposing upon them a burden from which defendants in *both* felony cases and cases involving summary offenses are specifically protected in the absence of any rational basis for making such a distinction?

STATEMENT OF THE CASE.

Appellant was tried in the Court of Quarter Sessions in Chester County, Pennsylvania, on two bills of indictment charging him with unlawfully and wantonly pointing and discharging a firearm at each of two persons. The alleged offenses were misdemeanors and violations of the Act of June 24, 1939, P. L. 872, § 716; PA. STAT. ANN. tit. 18, §4716. The maximum penalty for the indicted offense was a fine not exceeding $500 or imprisonment not exceeding one year or both.

At trial—at which appellant presented his defense *in propria persona*—a verdict of not guilty was directed by the trial court as to one bill (No. 226, September 1961) and the jury placed the costs of prosecution upon the County. As to the second bill (No. 225, September 1961)—in issue here—the jury returned a verdict of not guilty but, pursuant to the Act of 1860, ordered appellant to pay the costs of the prosecution in the amount of $230.95. The court, thereupon, ordered defendant to pay the costs or give security within ten days or stand committed to jail until he complied therewith. Having so posted security, defendant filed a Motion to be Relieved of Payment of Costs on the ground, *inter alia,* that the imposition of costs was contrary to law (R. 33-34).

Defendant initially argued his Motion *in propria persona* on April 27, 1962. While the Court held the matter under advisement, counsel entered their appearance for appellant and filed a Petition for Re-Hearing. The Petition stated, *inter alia,* that "the instant proceedings raise fundamental issues under the United States and Pennsylvania Constitutions which are sufficiently complex to prevent an adequate presentation by the defendant who is not trained in the law." (R. 34-35) A rehearing was granted and counsel thereupon argued the three basic federal constitutional questions which are presented in this appeal. On January 12, 1963, the trial court sustained appellant's

contentions as to all three and held that the Act of 1860, as applied to an acquitted defendant, violated the federal constitution. Appellant's Motion was granted, the verdict "insofar as it imposes upon defendant the penalty of the payment of costs of prosecution" was set aside and the sentence was vacated.

On December 12, 1963, the Superior Court of Pennsylvania reversed the order of the trial court and reinstated the sentence. The majority opinion, written for the court by Judge Robert E. Woodside, held that since the Act had been sustained by the Supreme Court of Pennsylvania in 1875—since the ratification of the Fourteenth Amendment—its federal constitutionality had been conclusively determined. The Court also rejected each of the federal constitutional questions affirmed by the trial court. Judge Gerald F. Flood filed a dissenting opinion which declared that the Act of 1860 was clearly penal in its thrust and violated federal due process.

On appeal to the Supreme Court of Pennsylvania, the order of the Superior Court was affirmed with Mr. Justice Samuel J. Roberts writing the opinion for the four-Justice majority (two Justices did not take part in the consideration of the case). The Court held that because the Act was "civil" rather than "penal" in its application, any consideration of due process protections was academic. However, it went on to discuss and uphold the Act in light of each of appellant's specific constitutional objections. Mr. Justice Herbert B. Cohen filed a dissenting opinion stating that he would adopt the opinion of Judge Flood of the Superior Court.

Having posted the necessary security, defendant is not confined to jail during the pendency of this appeal.

SUMMARY OF THE ARGUMENT.

The Act of 1860 exposes a defendant such as appellant, acquitted of the only offense of which he was charged, to a sentence to pay the costs of prosecution, under threat of automatic imprisonment for failure to pay, without providing any statutory standard whatsoever for defining the conduct being punished. As Pennsylvania courts have construed the Act, the penalty of costs is imposed if the defendant is guilty of "some misconduct", "reprehensible conduct" or "impropriety of conduct." These deficiencies render the Act void for vagueness both on its face and as construed. *Baggett v. Bullitt*, 377 U. S. 360; *Lanzetta v. New Jersey*, 306 U. S. 451.

The simple fact that the Act permits the Commonwealth to condemn and imprison a completely innocent person is sufficient to render it unconstitutional. However, the method by which "guilt" is determined also violates federal due process. Indeed, at each and every step of the judicial process, the defendant is denied his constitutional rights.

First, before a would-be defendant commits any act which may lead to later punishment, he is denied fair warning of what conduct may be against the law. *Lanzetta v. New Jersey, supra; Winters v. New York*, 333 U. S. 507, 524 (Frankfurter J., dissenting).

Once indicted for the original misdemeanor, he still is not charged with a specific infraction for which costs may be assessed, other than, as Pennsylvania courts have said, to be charged with misconduct "related to the indicted offense." Thus unaware of what supposed wrongdoing may be punished, he is denied a reasonable opportunity to defend himself and is deprived of procedural due process. *In re Oliver*, 333 U. S. 251.

When his case comes to trial, a defendant electing to resist the possible assessment of costs is forced to scatter his defense far afield from the original misdemeanor indictment. For example, he may be compelled to offer affirma-

tive evidence of his good character. Under Pennsylvania practice, this permits the prosecution to impeach such evidence by introducing prior criminal convictions. Furthermore, since the prosecution need prove only a *prima facie* case on the original indictment to get to the jury and permit it to assess costs, defendant is denied the constitutional protection that his "misconduct" be proven beyond a reasonable doubt. *Leland v. Oregon,* 343 U. S. 790, 802-03 (Frankfurter, J., dissenting).

The vagueness of the Act also deprives the jury of a standard sufficiently precise to guide it so there will be no unfair discrimination or "ex post facto" treatment in the enforcement of the statute. Without such a standard it is entirely possible—indeed probable—that the jury would use a totally arbitrary, illegal or even unconstitutional standard in assessing costs. *Cox v. Louisiana,* 379 U. S. 536, 552.

After the jury has returned its verdict, defendant is further deprived of an effective opportunity to have the judge set aside the result for abuse of discretion. As with the jury, the judge is entirely without any statutory guide. Neither the judge nor an appellate court on review has any way of knowing why the jury acted as it did. Cf. *Jackson v. Denno,* 378 U. S. 368.

Each one of these defects is sufficient to require the invalidation of the Act of 1860. However, taken cumulatively, they demonstrate beyond all doubt that it violates federal due process.

The Act is also unconstitutional because it discriminates, without any rational basis, against defendants in misdemeanor cases by imposing the possibility of costs assessment against only them. In Pennsylvania, acquitted defendants in *both* felony cases and cases involving summary offenses are protected by specific statutes. This distinction is not based upon constitutionally defensible "degrees of evil", but on a completely arbitrary and unreasonable classification and thus is a denial of equal protection of the laws. *Skinner v. Oklahoma,* 316 U. S. 535.

ARGUMENT.

I. The Act of 1860 Is Void for Vagueness Because It Lacks Any Statutory Criteria Whatsoever for Its Enforcement and Because, as Construed, It Permits the Punishment of Those—Such as Appellant—Who Have Been Adjudged Guilty of No More Than "Impropriety of Conduct", "Reprehensible Conduct" or "Some Misconduct".

A. The Act of 1860 Is a Punitive Measure; It Forcibly Deprives a Defendant of His Property or His Liberty if He Does Not Pay.

The majority opinion of the Supreme Court of Pennsylvania concluded that a discussion of due process protections was academic to this case because the Act of 1860 was "civil" rather than "penal" in character (R. 50).[2] Little light would be shed on this case by appellant making a lengthy argument that the Act of 1860 is indeed "penal." The essential point is simply this: the statute allows the imposition of a penalty upon defendants in criminal cases. As Judge Flood pointed out in his dissenting opinion in the Superior Court (R. 19):

> "No amount of dialectic can alter the fact that this statute provides that an accused may go to jail without having been convicted of any crime—indeed after having been acquitted of the only crime of which he was charged."

2. In reaching this result the Court overruled its own pronouncements dating back as far as 1818. In *Commonwealth v. Tilghman*, 4 S. & R. 127, 129 (Pa. 1818), Mr. Justice Gibson stated, "I grant, that a statute imposing costs, is penal in nature and must be construed strictly . . ." In *Clemens v. Commonwealth*, 7 Watts 485 (Pa. 1838) the Court said, "The statute which enables a grand or petit jury to punish with costs is penal, and to be strictly construed."

The liability imposed under the Act of 1860—commitment to jail—is incurred only in criminal cases and as an adjunct of criminal law enforcement. The liability is only incurred, so Pennsylvania's state courts have said,[3] when defendants are "guilty of misconduct."

This punitive character is conclusively revealed in the following portion of the trial judge's charge in this case as to the application of the Act of 1860 (R. 31):

> "Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been *guilty* of *some misconduct* less than the offense which is charged but nevertheless *misconduct* of some kind as a result of which he should be required *to pay some penalty short of conviction,* the cost of prosecution may be placed upon him if his misconduct has given rise to the prosecution." (Emphasis supplied.)

In substance and effect, the Act of 1860 is similar to the punitive nature of "civil" forfeiture proceedings which have been held by this Court, just last Term, to be criminal insofar as the application of the constitutional exclusionary rule was concerned: *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U. S. 693. See also, *Lowe v. Kansas,* 163 U. S. 81 (requirement that prosecutor pay costs must comply with procedural due process).[4]

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3. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 127 (Pa. 1818); *Commonwealth v. Daly,* 11 Pa. Dist. 527 (Q. S. Clearfield 1902); *Commonwealth v. King,* 33 Pa. D. & C. 2d 235 (Q. S. Allegheny, 1963).

4. Appellee's contention, made in its Motion to Dismiss Appeal for Lack of Jurisdiction, that this Court is bound by the Pennsylvania Supreme Court's determination that the Act of 1860 is "civil" has been frequently rejected and most recently so in *Cox v. Louisiana,* 379 U. S. 536, 559, n. 8:

> "In the area of . . . constitutional protected rights, 'we cannot avoid our responsibilities by permitting ourselves to be "completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding."' *Haynes v. Washington,* 373 U. S. 503, 515-516; *Stern v. New York,* 346 U. S. 156, 181."

B. The Act of 1860 Lacks Any Statutory Criteria for Its Enforcement.

A statute imposing liability of this character must contain standards of guilt. The Act of 1860 has none. Without such standards it is void for vagueness. See *Baggett v. Bullitt*, 377 U. S. 360, and cases cited therein; *Lanzetta v. New Jersey*, 306 U. S. 451.

The "void for vagueness" doctrine is a command of due process; it rests on the following principles, both of which are lacking in the Act of 1860:[5] (a) if the state proposes to impose liability for some conduct it must give fair warning to the public by defining, as much as possible, the prohibited conduct;[6] and (b) likewise there must be a standard sufficiently precise to guide the court and jury so that there will not be unfair discrimination or "*ex post facto*" treatment in the enforcement of the statute.[7]

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5. See Note, Amsterdam, *The Void for Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 68 (1960); Collings, *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. Q. 195 (1955).

6. Mr. Justice Frankfurter, dissenting in *Winters v. New York*, 333 U. S. 507, 524, stated:

> "Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature's will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of 'due process of law.' The legal jargon for such failure to give forewarning is to say that the statute is void for 'indefiniteness.'"

7. Note, Amsterdam, 109 U. OF PA. L. REV. 67 at 93:

> "Many legal responsibilities may be made to turn—as many common-law duties have traditionally turned—upon the 'reasonableness' of conduct as viewed by some trier of fact. But it is in this realm, where the equilibrium between the individual's claims of freedom and society's demands upon him is left to be struck *ad hoc* on the basis of a subjective evaluation—as also in the realm of more obviously absolute official discretion—that there exists the risk of continuing irregularity with which the vagueness cases have been concerned."

Without such a standard, it is possible that a jury would punish a defendant for a perfectly legal, or, even more serious, a constitutionally protected act. This was the evil at which the holding on vagueness in *Cox v. Louisiana,* 379 U. S. 536, was directed: ". . . that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly."

Indeed, it is perhaps not entirely accidental that two Pennsylvania cases now pending involve areas of possible constitutionally protected activity. In *Commonwealth v. King,* 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), defendant was indicted and charged with the crime of libel in contravention of § 412 of the Act of June 24, 1939, P. L. 872; PA. STAT. ANN., tit. 18, § 4412. Following a verdict of not guilty, the jury assessed costs against defendant pursuant to the Act of 1860. Subsequently, the court rejected defendant's contention that the Act violated the Fourteenth Amendment and held that costs may be assessed against an acquitted defendant when his conduct is "serious and reprehensible." Yet, the act of defendant which the jury sought to punish may very well have been constitutionally protected by the rule of *Garrison v. Louisiana,* 379 U. S. 64, which expressly held that the First Amendment strongly restricts the power of states to impose sanctions for *criminal* libel. Similarly, in *Commonwealth v. Welsh,* Q. S. Bucks Co. Pa., Nov. Term 1962, Nos. 174-175, defendant was assessed costs in the amount of $2,098.59, even though acquitted of an indictment for "macing", in contravention of the Act of April 6, 1939, P. L. 16, § 1; PA. STAT. ANN., tit. 25, § 2374. It is entirely possible that the jury in *Welsh* punished defendant because it was out of sympathy with his particular political activity.

Moreover, if the jury does invade constitutionally protected areas, the absence of a standard also prevents an appellate court from ascertaining what act the jury sought to punish. This effectively negates any chance of proper appellate review.[8]

8. Cf. *Jackson v. Denno,* 378 U. S. 368.

C. The Act of 1860 Unconstitutionally Permits Punishment for "Reprehensible" or "Improper" Conduct or, as in the Charge in This Case, for "Some Misconduct."

A statute invalid under the "void for vagueness" doctrine is unconstitutional either because on its face or as construed by the courts, it offers no standard of conduct that is possible to know: *Winters v. New York*, 333 U. S. 507; *American Seeding Machine Co. v. Kentucky*, 236 U. S. 660; *International Harvester Co. v. Kentucky*, 234 U. S. 216.

The authoritative, long accepted Pennsylvania interpretation of the Act of 1860 comes from a case involving the Act of 1804, 4 Laws of Pa. 204 (Smith 1810), a predecessor which was substantially identical in wording to the Act of 1860.[9] Justice Gibson, in *Commonwealth v. Tilgh-*

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9. The statutory history of the Act of 1860 reveals a picture not of rational legislation, reflecting considered legislative judgment, but, on the contrary, a quixotic, unexplainable law which may have been the result only of legislative accident.

In 1791, in an act entitled "A Supplement to the Penal Laws of this State", the Pennsylvania Assembly declared that (1) in cases of "outlawry"; (2) in all cases in which the grand jury "returned ignoramus" on bills of indictment; and (3) in all cases "where any person shall be brought before a Court . . . on the charge . . . of having committed a crime, and such charge, upon examination, shall appear to be unfounded," the costs should fall on the county. 3 Laws of Pa. 37 (Smith 1810).

Subsequently, in 1797, the Assembly clarified the law: "Whereas, (it declared) . . . a party . . . acquitted [of an indictable offense] is equally liable to costs of prosecution as if he were convicted, *which operates injustice, and a punishment to the innocent* . . . Be it therefore enacted . . . that . . . all costs accruing on all bills . . . charging . . . [any] indictable offense, shall, if such party be acquitted by a petit jury . . . be paid out of the county stock . . . ." 3 Laws of Pa. 281 (Smith 1810). (Emphasis added.)

This enactment plainly demonstrates an original legislative intent in Pennsylvania to avoid what was evident even then, and what should be equally evident now, that the imposition of costs on acquitted defendants is a harsh and unjust practice "as punishment" unfairly imposed on innocent persons. In 1804 the Assembly enacted the following statute, 4 Laws of Pa. 204 (Smith 1810) (which was never

man, supra, **4 S. & R. 126 (Pa. Supreme Ct. 1818) (the first reported appellate case in Pennsylvania to involve the rule**

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signed by the Governor but became law nevertheless because it was returned by him too late to avoid becoming law):

> "WHEREAS experience has proved, that the laws obliging the respective counties to pay the costs of prosecutions, in all criminal cases, where the accused is or are acquitted, have a tendency to promote litigation: inasmuch as they enable restless and turbulent people to harass the peaceable part of the community, with trifling, unfounded, or malicious prosecutions at the expense of the public: Therefore,
>
> "SECT. I. *Be it enacted by the Senate and House of Representatives of the commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That from and after the first of November next, in all prosecutions, cases of felony only excepted, if the bill or bills of indictment shall be returned 'ignoramus' the grand jury who returns the same shall decide and certify on such bill, whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals, by the petit jury, on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county or the prosecutor, *or the defendant or defendants,* shall pay the costs of prosecution; and the jury so determining, in case they direct the prosecutor to pay the costs, shall name him or them in their return or verdict. [Emphasis supplied.]
>
> "SECT. II. *And be it further enacted by the authority aforesaid,* That whenever any jury shall determine, as aforesaid, that the prosecutor or prosecutors shall pay the costs, the court in which the said determination shall be made, shall forthwith pass sentence to that effect, and order him, her or them committed to the goal of the county until the costs are paid, unless he, she or they give security to pay the same within ten days."

From the context and expressed purposes of the act, it seems clear that the key to the statute lies with the words "or the prosecutor," and that the legislature was primarily concerned with ill-founded prosecutions and the desirability of relieving the county of *those* costs. See *Commonwealth v. Harkness,* 4 Binn. 194, 195-96 (Pa. Supreme Ct. 1811). In light of this, it seems that the words "or the defendant" (italicized above) were inserted either by mistake or without clear recognition of their ramifications. For the act, read literally, as, of course, it has been, reverted to a practice which only a few years before had been repudiated by the legislature as "unjust" and which was even then constitutionally forbidden by other state constitutions. See, e.g., Fla. CONST. Declarations of Rights § 14; Ga. CONST. art. I,

that an acquitted defendant may be forced to pay costs), explained the rationale of the act and the focal point of its provisions:

> ". . . a defendant, acquitted of actual crime, but *whose conduct may have been reprehensible* in some respects, or whose *innocence may have been doubtful.* . . . ."
>
> "The judgment is not on the indictment, but on something collateral to it. The defendant is not punished for a matter of which he stood indicted; (for he is acquitted of everything of that sort), though, on account of something, of *which he was not indicted,* some *impropriety of conduct,* or *ground of suspicion,* which the verdict of the jury has fastened on him. . . ."
>
> "There may, I apprehend, be acts, such as certain kinds of fraud, that are *offensive to morality,* that nevertheless are not indictable. . . ." (Emphasis supplied.)

The *Tilghman* case is still the law of Pennsylvania and its characterization of the Act has been repeated many times.[10] It was also the basis of the Court's charge in this case. See the relevant portion of charge, p. 10, *supra.*

Most recently, the standard was made even less definite by the majority opinion of the Superior Court in this case (R. 15):

> "There are endless situations in which the jury might find that the defendant's improper conduct was responsible for the prosecution even though he was not

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Bill of Rights § 1, para. X; Miss. CONST. art. 14, § 261; N. C. CONST. art. I, Declaration of Rights § 11.

The power of the jury to assess costs against innocent misdemeanor defendants was continued in the same language in the Act of 1860. Presumably the legislature, in enacting this statute, simply swept together all the existing legislation on the subject—without consideration of its merits.

10. *E.g., Baldwin v. Commonwealth,* 26 Pa. 171 (1856); *Commonwealth v. Daly,* 11 Pa. Dist. 527 (Q. S. Clearfield 1902).

> guilty of the crime charged. It is not unjust for a jury to impose costs upon a defendant where the defendant may have clearly committed the offense charged but was able to raise a reasonable doubt that the offense was brought within the statute of limitations; or where the prosecutor and the defendant involved in a fistfight were guilty of conduct not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs; or where the defendant in a 'drunken driving' case drank and then drove while in that twilight zone that exists at some stage of the drinking; or where defendants charged with adultery registered at a hotel as husband and wife but convinced the jury they had not actually committed adultery." [11]

These Pennsylvania cases demonstrate that the statute as construed offers no clear standard of guilt, that it is not "fenced in" sufficiently to give notice of what is to be punished.

In *Baggett v. Bullitt*, 377 U. S. 360, the statute involved required an employee of the State of Washington, as a condition of his employment, to take an oath that he was not a "subversive person." The act was struck down

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11. The harmful effect of Judge Woodside's majority dicta is vividly illustrated by a portion of Judge Flood's dissenting opinion in the Superior Court (R. 20):

> "The statute here condemns no act or omission. The majority points to the common law crimes, punishable under our statutes but defined only by the common law, i.e., decisions of the courts. The precise common law definitions of such crimes, e.g., murder, rape, burglary or arson, could not contrast more sharply than they do with the majority's attempt to define what is punishable here —conduct 'related to the prosecution', 'reprehensible conduct', conduct 'not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal division of the costs', the conduct in the twilight zone between drunken driving and something less or something reprehensible that does not constitute a crime, such as registering falsely at a hotel as husband and wife."

by this Court which found the oath framed in terms "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . ." 377 U. S. at 367.

In *Lanzetta v. New Jersey,* 306 U. S. 451, the statute provided for the fine or imprisonment of "any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or any other state . . . ." Such person was declared to be a "gangster" and subject to punishment for that reason. After an examination of the meaning of "gang" and "gangster," this Court held the statute invalid. The statute condemned no act or omission; the terms it employed to indicate what it purported to punish were, in the eyes of the Court, so "vague and uncertain" as to be "repugnant" to due process.

The *Baggett* and *Lanzetta* cases did not turn simply on the elusive meaning of the words "subversive person" or "gang." Void for vagueness issues are not problems in semantics. The *Lanzetta* statute was obviously an attempt to authorize the harassment—the punishment of individuals suspected of wrongdoing—suspected of some sort of misconduct which was deliberately or inexcusably left undefined. Justice Frankfurter, speaking of *Lanzetta* (in *Winters v. New York,* 333 U. S. 507, 540, dissenting opinion), identified the rationale of that decision, the vice of vagueness for which the statute was struck down, in the following terms:

> "Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable . . . although not chargeable with any particular offense."

This, then, is the gist of *Lanzetta* and the very same evil at which this Court struck in declaring unconstitutional

the statute involved in *Baggett*. It is the rationale of many similar cases, old and recent, such as *Stoutenburgh v. Frazier*, 16 App. D. C. 229 (D. C. Cir. 1900), and *People v. Alterie*, 356 Ill. 307, 190 N. E. 305 (1934), and the cases cited with approval in *Baggett v. Bullitt, supra*, 377 U. S. at 367. We submit that the Act of 1860 has precisely the same evil.

It might be noted that by invalidating *this* act, this Court need not hold that the legislature may enact no statute imposing costs on acquitted defendants. We might concede, *arguendo*, that situations can be conceived in which it would not be unfair to require acquitted defendants to pay costs. But these situations must be precisely defined; the elements of this punitive liability must be adequately spelled out. The present statute can be used to permit a jury, unrestrained, to punish any sort of conduct or misconduct—or indeed any sort of person—which it may, *ex post facto*, decide should be penalized.

D. If Allowed to Stand, the Majority Opinions Below Will Doubtless Result in an Even Broader Use in the Future of the Punitive Provisions of the Act of 1860.

The impact of the decision here will extend well beyond the present case. In *Commonwealth v. Welsh*, Q. S. Bucks Co. Pa., Nov. Term 1962, Nos. 174-175; p. 12, *supra*, defendant has subsequently filed a Motion In Arrest of Judgment, raising substantially the same federal questions presented in this case. The motion is being held under advisement pending outcome of the instant case.

Commonwealth v. King, 33 Pa. D. & C. 2d 235 (Q. S. Allegheny 1963), p. 12, *supra*, has been appealed to the Superior Court of Pennsylvania; however, upon application by appellant, argument has been deferred pending the outcome of this case.

Although appellant has no definite statistics, he believes that costs are assessed against acquitted defendants in most Pennsylvania counties. However, the number of reported cases is relatively few, apparently because defendants are so relieved at being acquitted of the indicted offense that they would prefer to pay the costs rather than engage in additional litigation.

Unless this Court reverses the order of the Supreme Court of Pennsylvania, the "standards" of "conduct related to the prosecution" and "reprehensible conduct" contained in the Superior Court's majority opinion will find their way into jury charges of future Pennsylvania cases just as "guilty of some misconduct" and "misconduct of some kind" became part of the charge in this case (R. 31). The inescapable result of these dicta, if not reversed, will be a use of the Act of 1860 over a broader factual scale in Pennsylvania in the coming years.

Furthermore, there will be a serious danger that punishment of future defendants will be imposed by the Act of 1860 where the indicted misdemeanors raise delicate distinctions between constitutionally protected acts and the valid exercise of police power. In these areas, the standards must be especially precise. If the protection afforded by a tightly worded misdemeanor statute is completely obviated by the concomitant costs possibility, numerous serious constitutional abuses will occur.

II. The Act's Procedural Unfairness and Its Punishment of Innocent Persons Clearly Deprive Appellant of Due Process of Law.

Due process of law is a guarantee of fundamental fairness. The Act of 1860 falls short of that standard in two ways. It is unconstitutional not only because it sanctions the punishment of innocent persons, but equally because of the method by which it permits "guilt" to be established.

A. The Act of 1860 Is Unfair and Violates Due Process in a Procedural Sense Because:

(1) It is unconstitutionally vague—it is utterly lacking in standards defining the proscribed conduct by which the determination of guilt may be made. (See Point I, *supra.*)

(2) Although it permits the imposition of a punitive sanction, it nevertheless strips the defendant of his right to defend against this punishment by failing to provide him with the requisite notice of the precise misconduct upon which liability is to be founded. *In re Oliver,* 333 U. S. 257.

(3) It fails to provide a hearing *on the issue the jury is to determine.* The only hearing contemplated is the hearing on the crime charged in the indictment.[12] Therefore, since the evidence is limited to that charge, other defense evidence which would be relevant only to the imposition of costs under the Act of 1860 may be barred on the ground that it is not relevant to the indictment. This failure to afford the defendant a reasonable opportunity to defend himself constitutes a denial of due process of law. *In re Oliver, supra.*

(4) It subjects defendant to the probability that his basic defense on the indictment will be prejudiced. For example, to establish his lack of "misconduct", defendant may be compelled to offer affirmative evidence of his good character. Under Pennsylvania practice, this permits the prosecution to impeach by introducing evidence of prior criminal convictions. Thus, defendant is forced to elect. If he defends against the assessment of costs, he is forced to prejudice his defense against the indicted offense.

(5) It relieves the prosecution of the burden of proving those elements which it must prove to establish the

12. For an analysis of these practical procedural aspects, see Judge Flood's opinion (R. 21-22).

requisite "misconduct" beyond a reasonable doubt. It is fundamental that due process in a criminal proceeding includes the right to be deemed innocent until proven guilty beyond a reasonable doubt. *Leland v. Oregon,* 343 U. S. 790, 802-03 (Frankfurter, J., dissenting); *Brinegar v. United States,* 338 U. S. 160, 174 (dictum); *Coffin v. United States,* 156 U. S. 432, 453-56 (dictum). Although the prosecution may have the advantage of reasonable presumptions,[13] nevertheless, the basic burden always remains upon the prosecution.

Each one of these defects, we believe, is sufficient to require the invalidation of the Act of 1860. But when taken cumulatively, they demonstrate beyond all doubt that the statute, as now written and enforced, is so lacking in procedural due process that it is patently unconstitutional.

The foregoing defects make it easily possible that a person entirely innocent of wrongdoing in fact can be punished (and have a court "pass sentence" [14] upon him). Beyond this, the statute by its terms contemplates the imposition of this penalty upon a person who has been acquitted of the only crime with which he has been charged. This in itself is contrary to fundamental fairness.

B. The Act of 1860 Violates Due Process Because It Imposes Punishment (Whether or Not We Characterize It as "Criminal Liability") on Men Who Are Admittedly Innocent in the Eyes of the Law. This Is Abhorrent to the Basic Principles of Justice as Guaranteed by the Fourteenth Amendment.

A determination as to the limits of due process is aided by reference to the law elsewhere: is this practice

13. Compare *Tot v. United States,* 319 U. S. 463 with *Leland v. Oregon,* 343 U. S. 790.

14. Act of 1860, p. 3, *supra.*

followed, or, conversely, condemned, in jurisdictions which share the same basic concepts of criminal justice? See *Leland v. Oregon*, 343 U. S. 790, 798;[15] *Rochin v. California*, 342 U. S. 165; *Adamson v. California*, 332 U. S. 46.

At common law—in England in the 17th and 18th centuries—costs lay where they fell. Innocent defendants were never required to pay their prosecutors' costs. See, Archbold, *Pleading and Evidence in Criminal Cases* 161 (1834 ed.); 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); Note, *Criminal Costs Assessment in Missouri—Without Rhyme or Reason*, 1962 WASH. U. L. Q. 76-77. In England today, not only are costs not imposed upon acquitted defendants, but *precisely the opposite*, there is provision for the award of expenses properly incurred in carrying on their defense. Costs in Criminal Cases Act, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 48 (1952). See Note, 1962 WASH. U. L. Q. 76, 77-78.[16]

The federal procedure permits costs to be taxed only in the case of a conviction: 28 U. S. C. § 1918 (1958). Also, several states have statutory provisions on the subject (full texts of which are attached hereto as Appendix B), all of which protect acquitted defendants from the imposition of

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15. "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' *Snyder v. Massachusetts*, 291 U. S. 97, 105 (1934)." *Leland v. Oregon, supra* at 798.

16. In discussing equality in the administration of criminal justice in the Fifth Annual James Madison Lecture on February 11, 1964, former Mr. Justice Goldberg said (39 N. Y. U. L. Rev. 205, 223-4):

> ". . . [W]e can learn much from the Scandinavian countries * * * If the accused is acquitted no effort is made to collect the cost of defense regardless of the defendant's means. * * *.
>
> . . . [W]e should certainly consider adopting procedures whereby persons erroneously charged with crime could be reimbursed for their expenditures in defending against the charge."

costs. The Act of 1860 reflects a practice which has been condemned in other states. See, *e.g., Arnold v. State,* 76 Wyo. 445, 306 P. 2d 368 (1957); *Childers v. Commonwealth,* 171 Va. 456, 198 S. E. 487 (1938); *State v. Brooks,* 33 Kan. 708, 7 Pac. 591 (1885); *Biester v. State,* 65 Neb. 276, 91 N. W. 416 (1902). Although none of these cases specifically involved a statute or order imposing costs on an acquitted defendant—for, we believe, in no state has the practice ever been authorized—nevertheless, in each case the court, by the way of dicta, indicated that costs should never be so imposed. As indicated, Note 9, *supra,* the practice is constitutionally forbidden in at least four states.

We believe no other jurisdiction imposes costs on acquitted defendants. Our research—portions of which is indicated above and in Appendix B—reveals no authority for the practice: see, *e.g.,* 1 Bishop, *New Criminal Procedure* §§ 1313, 1317 (1895 ed.); 14 Am. Jur., *Costs* § 107 (1938); 20 C. J. S., *Costs* § 437 (1940). All of the authorities found either prevented or condemned the practice.

It is said, however, that in Pennsylvania "at common law" the defendant bore the costs of a prosecution. E.g., *Commonwealth v. Tilghman,* 4 S. & R. 126, 127 (Pa. Supreme Ct. 1818); Kessler, *Criminal Procedure in Pennsylvania* 235 (1961). Beyond Justice Gibson's statement in *Tilghman, supra,* upon which later dicta seem to rely, we have found no case decided prior to the enactment of statutes dealing with the subject which demonstrate the common law practice in Pennsylvania. The history in Pennsylvania indicates that its adoption may even have been accidental; in any event, the history hardly supports the idea that the practice was carefully judged as fair.[17]

17. For a history of the Act, see Note 9, *supra.*

III. The Act of 1860 Singles Out Defendants Acquitted of a Misdemeanor by a Jury and Fastens a Peculiar Liability Upon Them—Yet Other Pennsylvania Costs Statutes Specifically Protect Defendants Acquitted of Both Felonies and Summary Offenses From Similar Penalties; Such Is a Denial of the "Equal Protection of the Laws" Guaranteed by the Fourteenth Amendment.

The Act of 1860 permits a jury to assess costs upon a defendant acquitted of the commission of a misdemeanor. The Act of Sept. 23, 1791, § 13; 3 Laws of Pa. 37 (Smith 1810); PA. STAT. ANN. tit. 19, § 1221, as construed, directs that no costs shall be imposed on a defendant found innocent in a summary proceeding. The Act of March 31, 1860, P. L. 427, § 64; PA. STAT. ANN. tit. 19, § 1223, which derives from the Act of 1797, 3 Laws of Pa. 281 (Smith 1810) wherein it had been declared that the imposition of *any* costs on an acquitted defendant was "unjust", deals with felonies and provides that costs shall not be imposed on a defendant found innocent of a felony charge.

The distinction between the "improper conduct" which leads to an indictment for a misdemeanor and which, under the Act of 1860, permits the imposition of punishment, i.e., costs, and the "improper conduct" which leads to an indictment for a felony or a summary offense and which, under 1221 or 1223, is not punishable by the imposition of costs in the event of an acquittal, is simply not rational. Such distinction is not the result of the application of a reasonable standard.

The peculiar penalty for "improper conduct" which is sanctioned by the Act of 1860 is not, vis-à-vis PA. STAT. ANN. tit. 19, § 1221 and § 1223, justified by practical exigencies nor by the dictates of experience. This is not a matter of "degrees of evil" which were held constitutional in *Truax v. Raich,* 239 U. S. 33. This penalty is the product of historical accident and only serves to impose upon a person

acquitted of a particular arbitrary category of offense a liability to punishment from which a person charged with a more serious offense or a less serious offense has been expressly immunized. Such is an unreasonable classification, a denial of the equal protection of the laws and is, therefore, unconstitutional. *Skinner v. Oklahoma,* 316 U. S. 535.

CONCLUSION.

For the reasons stated above, this Court should reverse the judgment and order of the Supreme Court of Pennsylvania and hold that the Act of 1860 is unconstitutional as applied to acquitted defendants.

Respectfully submitted,

PETER HEARN,
JAMES C. N. PAUL,
PAUL J. MISHKIN,
Attorneys for Appellant.

September 10, 1965.

APPENDIX "A".

PORTION OF CHARGE OF THE COURT DEALING WITH COSTS.

GAWTHROP, *P. J.:*

If, but only if, you find not guilty verdicts, members of the jury, do you dispose of the costs of prosecution. Now, with regard to the Bill No. 226, where I have directed that you find a verdict of not guilty, you will have to dispose of the costs of prosecution. Whatever you may determine as to the other bill of indictment, if you find the defendant not guilty on the Bill No. 225, that is, the one involving the incident with the Bauman boy, then and only then will you consider the costs of prosecution on that bill.

Costs of prosecution may be disposed of in three ways where misdemeanor charges are found unproved by a jury. The charge made in each of these bills of indictment, as to all counts, is a misdemeanor charge. In felony cases, that is, more serious offenses such as rape, robbery, burglary and so forth, the jury has nothing to do with disposing of the costs in case of an acquittal. In misdemeanor cases it is the jury's duty to dispose of costs if it finds not guilty verdicts. If you find the defendant not guilty on any bill of indictment you must dispose of the costs of prosecution in one of three ways. They may be placed either upon the defendant or upon the prosecutor, or upon the county. Where a defendant is found not guilty of a misdemeanor but the jury finds that he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction, the costs of prosecution may be placed upon him if his misconduct has given rise to the prosecution. If you find the defendant not

guilty and find that he should not pay the costs as defendant, you may consider whether or not you will put the costs of prosecution on the prosecutor.

Now, in the bill of indictment involving the incident with Mrs. Arters, Evelyn A. Arters is endorsed as the prosecutrix on the bill of indictment. In the bill charging the affair involving the Bauman boy, Elizabeth J. Fuhrman is endorsed on the bill as the prosecutrix. You may find that those persons are or are not the actual prosecutors, as the evidence may indicate to you, in either or both of the bills, if you find that someone else actually is the prosecutor. In any event, if you find the defendant not guilty on either of these bills,-or both, as to any not guilty verdict, you may consider placing the costs of prosecution on the prosecutor if you decide the defendant should not pay them, if you find that the prosecution, instead of being brought in good faith for the reasons set forth in the charge, was on the contrary brought out of malice or some ill-will, or other improper motive; and if you find that neither the defendant nor the prosecutor should pay the costs of prosecution, in case of a not guilty verdict, then you may place the costs in the only other place where they may go, and that is on the County of Chester.

I repeat, you do not come to the question of disposing of the costs unless and until you find a verdict of not guilty. Now, under these rather strange circumstances, you will have to dispose of the costs of prosecution on Bill No. 226 in any event because I have directed that you return a verdict of not guilty on that bill. As to Bill No. 225, involving the Bauman boy, you won't reach that question of costs unless and until you first find the defendant not guilty. If you do find him not guilty on that bill, then you will consider the costs of prosecution.

(Remaining portion of Charge of Court not transcribed.)

(The Jury retired but returned for further instructions as follows:)

THE COURT: Members of the jury, you have asked this question of the Court in writing: "If a verdict of innocence is arrived at may we then divide the costs of prosecution between the defendant and the prosecutor? If so, may we decide how the costs should be divided?"

I will answer those questions in the order in which you have asked them. If you find a verdict of not guilty on either or both bills of indictment, and you will recall that we have directed you to find a not guilty verdict on one of the bills involving Mrs. Arters' matter, if you find a verdict of not guilty on any bill of indictment the costs on that bill of indictment may be divided between the defendant and the prosecutor, naming the prosecutor—and that is important if your verdict is to be effective—in such proportion as you determine to be appropriate. Our Act of Assembly provides that that may be done.

That answers, I think, both of your questions. In other words, first, you may, in case of a not guilty verdict, divide the costs between the prosecutor and the defendant, on that or any such bill of indictment. And in so doing you must name the prosecutor to make your verdict effective in that respect. You may divide the costs between the defendant and the prosecutor in such proportion as to you seems proper under the circumstances.

Does that answer your question?

FORELADY: Yes.

THE COURT: Very well. Will you please retire to your jury room and determine upon your verdict, having in mind that if in the bill of indictment involving the boy Donald Bauman you arrive at a not guilty verdict, you will therefore, on both bills of indictment, have to dispose of the costs of prosecution in accordance with the instructions I have given you.

Will you please return to your jury room.

(End of Charge on costs.)

APPENDIX "B".

AUTHORITIES FROM OTHER JURISDICTIONS.

COL. REV. STAT. § 32-2-1 (1953):

"The costs in criminal cases shall be paid by the county in which the offense was committed, when the defendant shall be convicted and shall be unable to pay them; when the defendant is acquitted the costs shall be paid by the county in which the offense was committed, unless the prosecuting witness be adjudged to pay them. . . ."

CONN. GEN. STAT. ANN. § 54-143 (1958):

"The costs of prosecution shall not be imposed against any person convicted of crime . . ."

DEL. CONSTIT. ART. XV, § 3:

"No costs shall be paid by a person accused, on a bill returned ignoramus, nor on acquittal."

FLA. STAT. ANN. § 939.06 (1941):

"No defendant in a criminal prosecution who is acquitted or discharged shall be liable for any costs or fees of the court or any ministerial office, or for any charge of subsistence while detained in custody . . ."

ILL. REV. STAT. Ch. 38, § 180-3 (1963):

"When any person is *convicted* of an offense under any statute, or at common law, the court shall give judgment that the offender pay the costs of the prosecution. (Emphasis added.)

See *Heist v. People*, 56 Ill. App. 391 (1895) holding that an acquitted defendant is absolved from payment of all costs.

IND. STAT. ANN. § 9-1826 (1956):

"When a defendant is acquitted in a criminal action he shall not be liable for any costs . . ."

See *Smith v. State,* 5 Ind. 541 (1854) holding that when, by a judgment of the Supreme Court, a defendant is finally acquitted, no costs are taxed to him.

IOWA CODE ANN. § 337.12 (1953):

"In all criminal cases where the prosecution fails . . . the fees allowed by law in such cases shall be audited by the county auditor and paid out of the county treasury . . ."

LA. REV. STAT. ANN. § 15-529.9 (1950):

"Every judgment of conviction shall subject the person convicted to the payment of all costs of the prosecution whether so stated in the sentence or not. In no case shall any person be subject to the payment of costs in any criminal prosecution when acquitted by the court or jury."

MASS. ANN. LAWS ch. 278, § 14 (1956):

"No prisoner or person under recognizance, acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees or for any charge for subsistence while he was in custody."

MD. CODE ANN., art. 24, § 7 (1957):

"No person who may be prosecuted for any misdemeanor or offense and discharged by the court on submission, or fined not exceeding fifteen cents, or prosecuted for any crime and acquitted on trial by jury, shall be burdened with the payment of any costs or fees accruing on such prosecution, but all such costs and fees, *with the legal costs of the party accused,* shall be paid by the county. . . ." (Emphasis added.)

MICH. STAT. ANN. tit. 28, § 28.1057 (1948):

"No prisoner or person under cognizance who shall be acquitted by verdict or discharged because no indictment has been found against him, or for want of prosecution, shall be liable for any costs or fees of office, or for any charge of subsistence while he was in custody."

MISSISSIPPI CONSTIT. ART. 14, § 261:

"The expenses of criminal prosecutions . . . shall be borne by the county in which such prosecutions shall be begun . . . . Defendants, *in cases of convictions,* may be taxed with the costs." (Emphasis added.)

MISSOURI STAT. ANN., tit. 37, § 550.040 (1959):

"In all capital cases, and those in which imprisonment in the penetentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state; and in all other trials on indictments or information, if the defendant is acquitted, the costs shall be paid by the county in which the indictment was found or information filed, except when the prosecutor shall be adjudged to pay them or it shall be otherwise provided by law."

N. H. REV. STAT. ANN. § 618:14 (1955):

"The assessment of any costs against respondents in criminal cases is hereby forbidden and all laws whether or not specifically designated hereinafter are hereby repealed insofar as they assess costs against respondents in criminal cases . . ."

N. J. S. A. § 22A:3-2 (1964):

". . . No costs shall be charged against the defendant where indictment is quashed, the defendant is acquitted or the judgment is arrested."

N. Y. Code of Criminal Procedure § 719:

"When the defendant is acquitted, either by the court or by a jury, he must be immediately discharged; and if the court certify, upon its minutes, or the jury find that the prosecution was malicious or without probable cause, the court must order the prosecutor to pay the costs of the proceedings. . . ."

N. C. Gen. Stats. § 6-49 (1951):

"In all criminal actions in any court, if the defendant is acquitted, *nolle prosequi* entered, or judgment against him is arrested, or if the defendant is discharged from arrest for want of probable cause, the costs, including the fees of all witnesses . . . shall be paid by the prosecutor . . ."

Okla. Stat. Ann. § 101 (1951):

"The fees herein provided for . . . and all costs in the prosecution of all criminal actions shall *in case of conviction of* the defendant be adjudged *a part of the penalty of the offense of which the defendant may be convicted* . . ." (Emphasis added.)

Tenn. Code Ann. § 40-3332 (1956):

"The state, or the county in which the offense was committed or is triable, according to the nature of the offense, pays the costs accrued on behalf of the state, and for which the state or county is liable . . . in the following cases:

(1) When the defendant is acquitted by a verdict of the jury upon the merits.

(2) When the prosecution is dismissed, or a nolle prosequi entered by the state.

(3) When the action has abated by the death of the defendant.

(4) When the defendant is discharged by the court or magistrate before indictment preferred or found, or after indictment and before verdict.

(5) When the defendant has been convicted, but the execution issued upon the judgment has been returned 'nulla bona'."

TEXAS CODE OF CRIM. PROC., Art. 1018 (1950):

"When the defendant is *convicted,* the costs and fees paid by the State under this title shall be a charge against him, except when sentenced to death or to imprisonment for life. . . ." (Emphasis added.)

WASH. REV. CODE ANN. tit. 10, § 10.46.200 (1881):

"No prisoner or person under recognizance who shall be acquitted by verdict or discharged because no indictment is found against him, or for want of prosecution, shall be liable for any costs or fees of any officer or for any charge of subsistence while he is in custody . . ."

WISC. STAT. ANN. § 959.055 (1958):

". . . when the defendant is acquitted the county shall pay the costs . . ."

WYO. STAT. § 7-179 (1957):

". . . In all misdemeanor cases, where the defendant is acquitted, the court or jury, before whom the case is tried, may assess the costs against the prosecuting witness or the costs of said action may be assessed against the county, but in all cases where the prosecuting attorney files the complaint, in his own name, the county shall pay the costs if the defendant be acquitted."

APPENDIX "C".

ORDERS, JUDGMENTS AND DECREES APPEALED FROM.

ORDER OF TRIAL COURT:

"Defendant's motion to be relieved of the costs of prosecution is granted. The verdict, insofar as it imposes upon defendant the penalty of the payment of costs of prosecution, is set aside as being contrary to law. The sentence imposed upon defendant that he pay said costs forthwith or give security to pay the same within ten days and to stand committed until he had complied therewith is vacated." (January 12, 1963)

ORDER OF SUPERIOR COURT OF PENNSYLVANIA:

"Order reversed, sentence reinstated." (December 12, 1963)

ORDER OF SUPREME COURT OF PENNSYLVANIA:

"The order of the Superior Court is affirmed." (July 6, 1964)

In The

Supreme Court of the United States

October Term, 1965
No. 47

JAY GIACCIO,
Appellant

vs.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Supreme Court of Pennsylvania, Eastern District

BRIEF FOR APPELLEE

WALTER E. ALESSANDRONI
Attorney General of Pennsylvania
GRAEME MURDOCK
Deputy Attorney General
Main Capitol
Harrisburg, Pa.
A. ALFRED DELDUCO
District Attorney of Chester County
JOHN S. HALSTED
Assistant District Attorney
Court House
West Chester, Pa.
Attorneys for Appellee

Murrelle Printing Company, Law Printers, 201-203 Lockhart Street, Sayre, Pa.
John J. Teti, Chester County Representative, Court House, West Chester, Pa.

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TABLE OF CITATIONS

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Is the Act of 1860, pertaining to the disposition of court costs upon the trial of misdemeanor cases, unconstitutionally vague as construed by the Supreme Court of Pennsylvania and as applied by the Pennsylvania Courts since 1804?

2. Is the procedure for applying the provisions of the Act of 1860 as established by the Legislature of Pennsylvania contrary to the requirements of the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

a. Is it fundamentally unfair not to excuse a person found not guilty of a particular crime from all liability for his actions in connection with the prosecution?

3. Is it contrary to the requirements of the "equal protection" provisions of the Fourteenth Amendment for the legislature of Pennsylvania to provide differently for the placement of costs in the case of felonies, misdemeanors and summary proceedings, each of which is substantially and historically different?

STATEMENT OF THE CASE

The Appellant, Jay Giaccio, was indicted and tried on bills of indictment 225 and 226, September Sessions 1961, in the Court of Quarter Sessions of Chester County, Pennsylvania. Each of the above bills of indictment charged the misdemeanor of unlawfully and wantonly pointing and discharging a firearm at each of two different persons. This is a violation of the Act of June 24, 1939, P. L. 872, 716; Stat. Ann. tit. 18, 4716. At the trial of the case before the judge and jury, the Appellant preferred to represent himself and refused the offer of the trial court to appoint counsel for him. The substance of the Appellant's defense was that the only firearm which he had pointed or discharged at any person was a blank starter pistol.

After hearing the evidence, the charge of the Court, and due deliberation, the jury returned a verdict of not guilty on each bill of indictment and ordered the County to pay the costs on Bill Number 226 and directed that the Appellant pay the costs of prosecution on Bill Number 225.

Thereafter, at the behest of Appellant and upon request of the court, the District Attorney's Office prepared for the Appellant a Petition to be relieved from the payment of costs and that Petition was filed on April 21, 1962.

A hearing was had on Appellant's motion on April 27, 1962, and on June 13, 1962, James C. N. Paul, Esquire,

and Peter Hearn, Esquire, appeared as counsel for the Appellant and filed a petition for rehearing. That petition was granted and argument had, at which time Appellant's counsel asserted the Constitutional objections which are the basis for the present appeal.

On January 12, 1963, President Judge Thomas C. Gawthrop filed an Opinion in the Court of Quarter Sessions of Chester County, holding so much of Section 62 of the Act of 1860, P. L. 375 Pa. Stat. Ann. tit. 19, Section 1222, as gave the jury power to place the costs on acquitted defendants in misdemeanor cases unconstitutional and ordered the sentence imposing costs vacated.

Thereafter, the Commonwealth filed an appeal from that order and certiorari was directed to the Clerk of the Court of Quarter Sessions, Chester County, Pennsylvania, on February 28, 1963.

On December 12, 1963, the Superior Court of Pennsylvania with only one judge dissenting reversed the order of the trial court and reinstated the jury's determination as to the payment of costs.

The matter was then taken on appeal to the Supreme Court of Pennsylvania, and on July 6, 1964, that court with a majority of five to one affirmed the order of the Superior Court. Thereafter, Appellant, through his counsel, filed a Notice of Appeal to the Supreme Court of the United States and after the filing of a Jurisdictional Statement and Commonwealth's Motion To Dismiss the Appeal on jurisdictional grounds, this Honorable Court noted probable jurisdiction.

The Appellant is not presently and never has been confined in prison.

SUMMARY OF THE ARGUMENT

The Act of 1860 creates no vague new criminal offense to entrap the unsuspecting. The Act intends and encompasses nothing more than a procedure whereby the machinery of the criminal courts is used to dispose of the court costs. *Commonwealth vs. Giaccio,* 415 Pa. 139, 202 A. 2nd 55 (R. 51).

The application and interpretation of the provisions of the Act of 1860 over the years indicates that it is not a penal statute to be judged by the same standards as a law creating a new offense. The interpretation of this statute by the courts of Pennsylvania and the common law surrounding costs in criminal cases should not be overlooked or ignored by this court. *Bandini Petroleum v. Supreme Court,* 284 U. S. 8; *Musser v. Utah,* 333 U. S. 95.

At common law in Pennsylvania, the defendant always paid the costs of prosecution. The Pennsylvania legislature since 1791 has struggled with the placement of costs in criminal cases until it reached the middle ground between the defendant always paying the costs and the defendant never paying the costs.

Regardless of what label is put on the Act of 1860, civil, penal or something in between, it is not void as being too vague. The Appellant was arrested, indicted, and tried by the judge and jury for committing a statutorily well-defined misdemeanor. The rules of evidence and the charge of the court strictly limit that which the jury can

consider in deciding the defendant's liability for costs. Because the jury is given the power to assess a person's behavior and because they may judge it differently than did that person himself is in no way fatal to this Act. *Nash v. United States,* 229 U. S. 373.

The jury is given some guided discretion to apply its judgment to a limited set of facts and to make a determination of liability. Such procedure is not constitutionally condemned. *Roth v. U. S.,* 354 U. S. 476.

Procedurally, the Act of 1860 does not violate the Due Process Provision of the Fourteenth Amendment. The fact that the placement of costs is considered incidentally to the trial for the misdemeanor offense and without a separate and distinct hearing is not fatal to its constitutionality. *Lowe v. Kansas,* 163 U. S. 81.

The possibility of abusive use of the costs provisions of this Act is well controlled. The harassing prosecutor is discouraged and punished by the power given to the jury by this Act to place the costs upon him. An irresponsible jury determination is subject to being set aside by the trial court. *Guffy v. Commonwealth,* 2 Grant 66 (Pa. Supreme Court 1853).

The legislative and case history of the Act of 1860 shows that there has been no serious objections made either to its substance or procedure in the more than 100 years that it has been in effect. In view of this, it is doubtful that this Act is fundamentally unfair as Appellant asserts.

It cannot be denied that this Act is unique in the present day and age; however, uniqueness should not be equated with badness, and the legislature rather than the

courts should judge the wiseness and acceptability of this Act. *Ferguson v. Skrupa,* 372 U. S. 726.

Finally, the fact that defendants acquitted of misdemeanors are treated differently from defendants in felony or summary matters does not violate the Equal Protection Clause of the Fourteenth Amendment. The historical and actual difference in the quality and severity of felonies, misdemeanors, and summary offenses is sufficient to overcome the objection that the legislative classification is palpably arbitrary. *Phillips Chemical Co. v. Dumas School District,* 361 U. S. 376; *Skinner v. Oklahoma,* 316 U. S. 535.

ARGUMENT

I. THE ACT OF 1860 IS NOT UNCONSTITUTIONALLY VAGUE AS APPLIED BY THE COURTS OF PENNSYLVANIA SINCE 1804 AND AS CONSTRUED BY THE SUPREME COURT OF PENNSYLVANIA

A. The Act of 1960[1] as viewed by the Pennsylvania Courts is not a penal statute.

It is clear that under the law of Pennsylvania that the court costs attendant to criminal prosecutions form no part of the penalty proposed for the substantive offense. As pointed out in the Opinion of the Pennsylvania Supreme Court, costs are considered as a matter separate and apart from the penalty for a crime (R. 50). The Opinion of the Supreme Court of Pennsylvania easily meets the Appellant's arguments that the act is clearly penal because the courts through the years have used such terms as "misconduct", "guilty", "penalty" and so forth. The court pointed out that these terms are not used in their technical sense but rather in a broader sense (R. 50).

It is argued that the possibility of imprisonment of a person for failing to pay the costs assessed against him

[1] Act of March 31, 1860, P. L. 427, Pa. Stat. Ann. tit. 19, Section 1222.

is a clear indication of the nature of the act. In answer to this, the Opinion of the Supreme Court of Pennsylvania points out that this is no more than "the court's exercise of its power to punish for contempt". The court further points out that a pauperous or insolvent defendant can be relieved of the payment of these costs without imprisonment (R. 50, footnote 5).

Whether this court is bound by the Pennsylvania Courts' characterization of the Act of 1860 is not the prime consideration. The important consideration is that the Pennsylvania Courts' characterization of this Act as civil rather than penal is some evidence of how the Act has been applied through the years. Such considerations and characterizations should not be ignored by this court. *Bandini Petroleum v. Superior Court,* 284 U. S. 8; *Musser v. Utah,* 333 U. S. 95 and *Beauharnais v. Illinois,* 343 U. S. 250.

B. The Act of 1860 is not vague or uncertain when it is considered in conjunction with the body of law which preceded it and surrounds it.

Whether civil or penal in nature, the Appellee contends that the Act of 1860, as interpreted and applied by the Pennsylvania Courts, provides sufficient standards to satisfy the requirements of the Fourteenth Amendment. In making the determination as to whether this Statute is sufficient to withstand Appellant's objections, the words of the Act of 1860 cannot be considered in a vacuum. These provisions must be considered as a "part of the

whole body of common and state law of (the) state and to be judged in that context." *Musser v. Utah*, supra, 97.

Turning first to the common law of Pennsylvania with respect to costs in criminal cases, it appears that in Pennsylvania "by the common law, a defendant, though acquitted, always paid the costs."[2] The Appellant contends that the foregoing statement is either erroneous or at least that the common law situation in Pennsylvania is contrary to that found elsewhere. The Appellee would point out, however, that the common law situation in Pennsylvania was not completely anomalous. As this court observed in *U. S. v. Gaines*, 131 U. S. CLXIX, Appx., 25 L. Ed. 733 at common law the state never paid the costs. Evidence of the fact that the common law liability for costs remain even after acquittal can be found in two cases tried in the State of Delaware in the 18th and 19th Century.[3]

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[2] *Commonwealth v. Tilghman*, 4 S. & R. 127 (Pa. Supreme Ct. 1818). The above statement was made by Justice Gibson while reviewing the Act of 1804, the predecessor to the Act of 1860.

[3] Evidence of what the law in the State of Delaware was in the late 18th and 19th Centuries can be found in the cases of *State v. Miller*, 1 Del. Cas. 512 (1814), and *State v. Butcher*, 1 Del. Cas. 334 (1793); Delaware Code Annotated, Title 11, Section 4102. In the former case a prisoner who had been acquitted of burglary and who was unable to pay the costs was sold as a servant after the Court certified there was probable cause for the prosecution. In the latter case counsel for the defendant acquitted of indictments charging assault and battery moved for the defendant's discharge and counsel for the State objected that this could not be accomplished until the costs were paid. Further evidence, as to the early law in Pennsylvania, can be found in the Preamble of the Act of March 20, 1797, 3 Smiths Law 281, which stated, inter alia, "whereas, by the existing laws, a party acquitted is equally liable to the costs of prosecution as if he were convicted."

If the foregoing can be accepted as some evidence of what the law as to costs was in the early 19th Century, it would appear that the defendant's present possible liability for costs in Pennsylvania, while different from other jurisdictions, has at least been greatly improved by the legislature. The foregoing is not intended to be evidence of facetious thinking on the part of the Appellee, but rather to point out that, although the Legislature in Pennsylvania has not gone as far as other jurisdictions, it has at least consciously wrestled with the question of cost liability since 1797.

The Appellant takes the position that a review of the legislation concerning costs in criminal cases, starting in 1791 and proceeding through 1860, indicates that the present state of law is a legislative accident. It is argued that once having completely relieved defendants of their common law burden of paying the costs that the legislature in 1804 in endeavoring to discourage malicious prosecutions inadvertently created the present state of the law.[4] This appears to presume a great deal as the words pertaining to the liability of defendants for costs are clearly stated. It does not have the appearance of being a case of a printer's error, or a misplaced comma, or word. It is equally consistent to believe that the Act of 1804 and the Act of 1860 were a rational retreat towards the middle ground between costs always on the defendant and costs always on the State. At any rate the 56 years of applica-

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[4] The Appellant in his brief at footnote 9, pages 13 and 14, sets forth the pertinent portions of the Acts of 1791, 1797 and 1804.

Act of 1791, P. L. 37, 43, 44, 3 Smiths Laws 44;

Act of March 20, 1797, 3 Smiths Laws 281;

Act of 1804, 4 Smiths Laws 204.

tion of the Act of 1804 brought no legislative reaction in the Act of 1860.

The Appellant asserts that the language used by the Pennsylvania Courts in their charges and by the Superior Court in its opinion (R. 15) is clear evidence the Act of 1860 is too vague. The Appellant likens the Act of 1860 to the legislation condemned in *Baggett v. Bullit*, 377 U. S. 360, and *Lanzetta v. New Jersey*, 306 U.S. 451. The Appellant asserts that this Act must fall as did that legislation. The vagueness in those cases was found to be repugnant to the due process clause because the state is able to cast the net at large to trap the unsuspecting citizen. *Winters v. New York*, 333 U. S. 507, 540.

The crucial point to be recognized is that there is a substantial difference between the statutes in *Lanzetta* and *Bullit* and the present Act. As is apparent by the foregoing common law and legislative history of the Act of 1860, that it moves into no new area of human rights. It is not a statute which creates a vague new crime. It might be termed a "cleanup" provision or as Justice Roberts, speaking for the Supreme Court of Pennsylvania, put it, "nothing more is here involved than utilization of the machinery of the courts of quarter sessions for the disposition of costs." (R. 51)

Contrary to the *Lanzetta* case, the Appellant in this matter was not arrested, indicted or tried for the crime of "some misconduct" which was "offensive to morality". He was arrested, indicted and tried for violating a criminal statute of Pennsylvania which makes it a crime to playfully or wantonly point or discharge a firearm at another person.

The procedure established in the Act of 1860 does not allow the cost liability to be used as a dragnet or harass-

ment. A defendant does not face any liability for costs until a prima facie case has been established before the magistrate, the grand jury, and the judge and jury. Furthermore, the chance for abuse of the provisions of the Act of 1860 by prosecutors with a mind for harassment is largely eliminated by the provisions of the Act which make the malicious prosecutor liable for the costs at the jury's hand. It is admitted by Appellant that the legislature has the power to place costs on acquitted defendants, but it is asserted that the present statute is improperly drawn for this end. This raises several points. First, has not the legislature done all that it can? It would approach the impossible to write a statute which could define every kind of "impropriety of conduct" which would give rise to every misdemeanor prosecution. It is submitted that the Constitution does not require impossible standards, but only that the language of the statute convey a sufficiently definite warning when measured by common understanding and practice, *Roth v. United States,* 354 U. S. 476.

Second, has there been any abuse of the legislative power which violates the Fourteenth Amendment? The Legislature could have said, as did the common law, that the defendant will always pay the costs. *Lowe v. Kansas,* 163 U. S. 81, 86, 87. Is the constitution violated because the jury has the power to decide that a person may or may not be liable for the costs? Appellee would submit not. As the Pennsylvania Supreme Court stated, the defendant is not taken by surprise as "the provisions of the statute constitute clear notice and inform both prosecutor and defendant that the matter of costs may be determined incidentally to the basic issue of guilt or innocence". (R. 52)

Finally, there is the question of how much notice a person in the Appellant's position can expect or require. In considering this, Justice Holmes' often quoted statement in *Nash v. United States*, 229 U. S. 373, 377, is appropriate:

> "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death . . . The criterion in such cases is to examine whether common social duty would under the circumstances have suggested a more circumspect conduct."

It is submitted that the jury in disposing of the costs of prosecution pursuant to the Act of 1860 is doing no more than determining whether "common social duty would, under the circumstances have suggested a more circumspect conduct" on the part of the Appellant or other defendant.

The Appellant urges that if the Act of 1860 is upheld that its net will be spread wider to punish an ever increasing number of persons. A brief reflection on the nature of this Act should belie such assertion. The question of costs follows the arrest and trial for a misdemeanor. No person can ever be arrested and tried for being guilty of some misconduct. If the Commonwealth at any stage of the proceedings fails to establish a prima facie case, the prosecution may be discharged on demurrer and the defendant would have no further liability of any nature. It can only be reiterated that this is not a dragnet statute or a new law which endeavors to creep into areas of human rights protected by the constitution.

Argument

The fact that the procedure for the disposing of costs in misdemeanor cases works no hardship is apparent when one considers that since 1804 only two cases have sought to question the legality or justice of this Act.[5] The reason for this must be that the jury's power to dispose of costs "works substantial justice."[6] Why this is and why, as the Appellant observes, a defendant acquitted, but ordered by the jury to pay part or all of the costs, usually promptly settles the matter is probably best explained by the following observations of Judge J. Frank Graff in *Commonwealth v. King*, 37 Pa. D. & C. 2d, 235 (Quarter Sessions, Allegheny County) which were concurred in by the Pennsylvania Superior and Supreme Court (R. 7, 53):

> "As a factual matter, from a vast experience in the trial of cases, juries are reluctant upon occasion to adjudge a defendant guilty and seek the alternative of not making a record against him, but requiring him to pay the costs . . ."

or as Justice Roberts observes, it is the fervent hope of the defendant that the jury will return a verdict of not guilty but pay the costs (R. 53).

In conclusion, it might be pointed out that the Appellant's worries over serious constitutional abuses arising in the future would seem to be questionable, if one considers that evidence of such abuses is not apparent in the 101 years since 1804.[7]

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[5] *Commonwealth v. Tilghman*, supra; *Wright v. Commonwealth*, 77 Pa. 470 (1875).

[6] *Commonwealth v. Cohen*, 102 Pa. Superior Ct. 379, cited with approval in the Superior Court's Opinion in this case (R. 6).

[7] Cf. observation by Judge Woodside in Superior Court's Opinion at R. 9:

II. THE PROCEDURE UNDER THE ACT OF 1860 OF ALLOWING THE JURY UNDER THE CONTROL OF THE COURT TO ASSESS COSTS AGAINST AN ACQUITTED MISDEMEANOR DEFENDANT IS NOT CONTRARY TO DUE PROCESS OF LAW NOR IS IT FUNDAMENTALLY UNFAIR

The Appellant condemns the Act of 1860 not only for the principle which it expounds, but also for the procedure it uses to implement that principle.

A number of procedural objections are leveled against the Act. Those based on vagueness and lack of notice to defend have been considered in the first part of this brief.

With regard to the objection that there is no separate or sufficient hearing provided on the issue of costs, Appellee believes that this Court passed on a similar issue in *Lowe v. Kansas,* supra. In that case, this Court considered and approved both from the standpoint of Due Process and of Equal Protection under the law, a Kansas statute which permitted the jury to place the costs on the prosecutor in a criminal libel action, without any separate hearing on the matter of costs. In considering this question, this Court approved the reasoning of the Kansas Court that "the prosecuting witness was so connected with the

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"We know of no Pennsylvania statute whose validity has been attacked after so many years of constant application. Since the Act of 1804, two new constitutions have been adopted and scores of amendments have been made to the present constitution. There have been over a hundred regular sessions of the legislature and a score of special sessions since the Act of 1804 was enacted. Hundreds of judges have examined and passed upon the statutory provisions here questioned."

state in the trial of the prosecution that he was not entitled to a separate trial by jury upon the question of liability of costs". 163 U. S. 87.

If the private prosecutor in a criminal libel action is sufficiently involved in the trial to have been afforded Due Process, then reason would seem to dictate that the defendant in this misdemeanor trial has been afforded Due Process in at least an equal or greater measure.

At the trial of the misdemeanor charge, the evidence before the jury is determined and circumscribed by the charge laid in the indictment by the rules of evidence. At Appellant's trial the evidence was directed towards the issue of whether the defendant pointed and discharged a firearm at another person. The major issue to be decided by the jury was whether the gun in question was a blank starter pistol or an operational weapon. The evidence before the jury was directed toward the proof of these facts and it was only this evidence which the jury could have considered on the issue of the placement of costs, after they first determined the issue of guilt or innocence of the defendant. It is this evidence that the jury both legally and practically had to base their cost determination upon. As the Supreme Court of Pennsylvania observed "of course, costs of a trial cannot be imposed upon a defendant for conduct not related to the prosecution, nor for conduct concerning which there is no relevant evidence". (R. 52)[8] It is the limiting of the admissible evidence which affords the defendant his due process of law. In defending

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[8] See the trial court's charge at R. 31:

"... the costs of prosecution may be placed on him if his misconduct has given rise to the prosecution. . ."

against the misdemeanor charge, the defendant also defends against his cost liability.

The Appellant is also afforded the additional protection against abuse of the Act of 1860 by the trial court's traditional common law power and right to set aside the jury's placement of costs. *Guffy v. Commonwealth,* 2 Grant 66 (Pa. Supreme Court 1853); *Commonwealth v. Bixon,* 67 Pa. Superior Ct. 554 (1917). In addition there is the usual right to appeal as so amply demonstrated by the instant matter.

The Appellant objects to the Act of 1860 as being fundamentally unfair and contrary to the basic principles of justice because it imposes a liability on "innocent" persons and because the Act of 1860 is unique.

To argue whether the Appellant, who was acquitted of the misdemeanor but suffered the imposition of costs is guilty or innocent or partly both, is to engage in semantics. A person may be innocent of one charge, but still be guilty of some other breach of duty which will subject him to liability. A person may be acquitted of involuntary manslaughter in a vehicle accident, but on the same set of facts may be "guilty of negligence" which will result in liability. That Appellant submits that it is not a mandate of the United States Constitution that a verdict of not guilty is co-extensive with perfect innocence so that a person can incur no liability of his acts. It cannot be disputed that the Act of 1860 is unique in the present day and age. The fact that many states have felt the necessity either by their constitution or by their statutes to eliminate any possible cost liability on acquitted defendants might well be considered an indication that

the legislatures of these states felt that a particular condemnation of the practice was necessary as it in and of itself did not violate the general principles of Due Process as set forth in their constitution or law. Whatever the reason for Pennsylvania being unique this uniqueness is, of course, not constitutionally fatal. As this Court said in *Ferguson v. Skrupa,* 372 U. S. 726:

> "The doctrine that prevailed . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely has long since been disregarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of the legislative bodies, who elected to pass laws."

The legislature of Pennsylvania has the power to deal with the disposition of costs and it is submitted that it is that body which should make any change if the present practice is unwise or unjust.

III. IT IS NOT A VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO TREAT MISDEMEANOR DEFENDANTS DIFFERENTLY THAN DEFENDANTS CHARGED WITH SUMMARY OR FELONIOUS CRIMES WHEN HISTORICALLY AND SUBSTANTIVELY EACH CLASS OF CRIME AND OFFENDER IS DIFFERENT

It cannot be disputed that the acquitted defendant in a misdemeanor case in Pennsylvania is differently situated

from other defendants. The question to be answered is whether it is reasonable to classify and treat differently persons acquitted of misdemeanors from those acquitted of summary of felonious offenses. In this area the legislature's power to classify is extremely broad and is limited only by constitutional rights and "by the doctrine that a classification may not be palpably arbitrary". *Phillips Chemical Company v. Dumas School District,* 361 U. S. 376.

The burden on one asserting a legislative classification to be constitutionally improper is formidable. It has long been settled that a classification, though discriminatory, is not arbitrary nor violative of the Equal Protection Clause of the Fourteenth Amendment if any state of facts reasonably can be conceived that would sustain it. *Linsley v. Natural Carbonic Gas Co.,* 220 U. S. 61, 78; *Quong Wing v. Kirkendall,* 223 U. S. 59; *Rast v. Van Deman & Lewis Co.,* 240 U. S. 342, 357; *State Board of Tax Com'rs. of Indiana v. Jackson,* 283 U. S. at page 537.

What then are the facts which might sustain the legislative treatment of costs as contained in the Act of 1860? The reason for the different treatment of costs must lie in the difference between those offenses classified as misdemeanors and those as felonies. Although the criminal code now sets forth whether an offense is a felony or misdemeanor, it is fair to say that misdemeanors are now and always have been those offenses which are less serious than those classed as felonies. *Commonwealth v. Cano,* 389 Pa. 639, 650, 651. Because of their less serious and more common nature it could be supposed that the legislative experience indicated that misconduct either on the part of the defendant or prosecutor was likely to

precipitate an arrest and trial and that because there was such an increased possibility that the state should not in every case bear the costs of such prosecutions if they resulted in acquittals. It should also be considered that some misconduct which falls short of producing a felony conviction might well be comprehended in a misdemeanor offense, while misdemeanors in Pennsylvania are not often closely matched with summary offenses.

Justice Douglas in the case of *Skinner v. Oklahoma,* 316 U. S. 535, 540, set forth a state's power to classify crimes and offenders as follows:

> "For a state is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the Equal Protection Clause from confining 'its restrictions to those classes of cases where its need is deemed clearest.'"

In *Lowe v. Kansas,* supra, this court held that it was not in violation of the Equal Protection Clause to treat prosecutors in criminal libel cases differently from prosecutors in other cases with regard to the placement of costs. If it is not improper to treat a party to one particular crime differently from prosecutors in all other crimes, it should not be improper to treat differently defendants in an entire class of crimes from defendants in another class of crimes.

CONCLUSION

For the reason and considerations stated above, it is submitted that this Court should affirm the judgment and order of the Supreme Court of Pennsylvania holding that the Act of 1860 is constitutional.

Respectfully submitted,
WALTER E. ALESSANDRONI,
GRAEME MURDOCK,
A. ALFRED DELDUCO,
JOHN S. HALSTED,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1965.

Jay Giaccio, Appellant, v. State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.

[January 19, 1966.]

Mr. Justice Black delivered the opinion of the Court.

Petitioner Giaccio was indicted by a Pennsylvania grand jury and charged with two violations of a state statute which makes it a misdemeanor to wantonly point or discharge a firearm at any other person.[1] In a trial before a judge and jury petitioner's defense was that the firearm he had discharged was a starter pistol which only fired blanks. The jury returned a verdict of not guilty on each charge, but acting pursuant to instructions of the court given under authority of a Pennsylvania statute of 1860, assessed against petitioner the court costs of one of the charges (amounting to $230.95). The Act of 1860, set out below,[2] provides among other things that:

". . . in all cases of acquittals by the petit jury on indictments for [offenses other than felonies], the

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[1] Act of June 24, 1939, Pub. L. 872, § 716; Pa. Stat. Ann., Tit. 18, § 4716 (1963).

[2] Act of March 31, 1860, Pub. L. 427, § 62, Pa. Stat. Ann., Tit. 19, § 1222 (1963) provides:

"In all prosecutions, cases of felony excepted, if the bill of indictment shall be returned ignoramus, the grand jury returning the same shall decide and certify on such bill whether the county or the prosecutor shall pay the costs of prosecution; and in all cases of acquittals by the petit jury on indictments for the offenses aforesaid, the jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant, shall pay

> jury trying the same shall determine, by their verdict, whether the county, or the prosecutor, or the defendant, shall pay the costs . . . and whenever the jury shall determine as aforesaid, that the . . . defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

Petitioner made timely objections to the validity of this statute on several grounds,[3] including an objection that the statute is unconstitutionally vague in violation of the Fourteenth Amendment's Due Process Clause because it authorizes juries to assess costs against acquitted defendants, with a threat of imprisonment until the costs are paid, without prescribing definite standards to govern the jury's determination. The trial court held the 1860 Act void for vagueness in violation of due process, set aside the jury's verdict imposing costs on the petitioner, and vacated the "sentence imposed upon Defendant that he pay said costs forthwith or give secu-

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the costs, or whether the same shall be apportioned between the prosecutor and the defendant, and in what proportions; and the jury, grand or petit, so determining, in case they direct the prosecutor to pay the costs or any portion thereof, shall name him in their return of verdict; and whenever the jury shall determine as aforesaid, that the prosecutor or defendant shall pay the costs, the court in which the said determination shall be made shall forthwith pass sentence to that effect, and order him to be committed to the jail of the county until the costs are paid, unless he give security to pay the same within ten days."

[3] One objection was that the Act violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates against defendants in misdemeanor cases by imposing greater burdens upon them than upon defendants in felony cases and cases involving summary offenses. We do not reach or decide this question.

rity to pay the same within ten (10) days and to stand committed until he had complied therewith."[4] The Superior Court of Pennsylvania, one judge dissenting, reversed the trial court closing its opinion this way:

> "We can find no reason that would justify our holding it [the 1860 Act] unconstitutional.
>
> "Order reversed, sentence reinstated."[5]

The State Supreme Court, again with one judge dissenting, agreed with the Superior Court and affirmed its judgment.[6] This left petitioner subject to the judgment for costs and the "sentence" to enforce payment. We noted jurisdiction to consider the question raised concerning vagueness and absence of proper standards in the 1860 Act. 381 U. S. 923. We agree with the trial court and the dissenting judges in the appellate courts below that the 1860 Act is invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs.

1. In holding that the 1860 Act was not unconstitutionally vague the State Superior and Supreme Courts rested largely on the declaration that the Act "is not a penal statute" but simply provides machinery for the collection of costs of a "civil character" analogous to imposing costs in civil cases "not as a penalty but rather as compensation to a litigant for expenses. . . ." But admission of an analogy between the collection of civil costs and collection of costs here does not go far towards settling the constitutional question before us. Whatever label be given the 1860 Act, there is no doubt that it provides the State with a procedure for depriving an acquitted defendant of his liberty and his property.

[4] 30 Pa. D. & C. 2d 463 (Q. S. Chester, 1963).
[5] 202 Pa. Super. 294, 310, 196 A. 2d 189, 197.
[6] 415 Pa. 139, 202 A. 2d 55.

Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this State Act whether labeled "penal" or not must meet the challenge that it is unconstitutionally vague.

2. It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. See, *e. g.*, *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Baggett* v. *Bullitt*, 377 U. S. 360. This 1860 Pennsylvania Act contains no standards at all, nor does it place any conditions of any kind upon the jury's power to impose costs upon a defendant who has been found by the jury to be not guilty of a crime charged against him. The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says the jurors "shall determine, by their verdict, whether . . . the defendant, shall pay the costs" whereupon the trial judge is told he "shall forthwith pass sentence to that effect, and order him [defendant] to be committed to the jail of the county" there to remain until he either pays or gives security for the costs. Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce. This State Act as written does not even begin to meet this constitutional requirement.

3. The State contends that even if the Act would have been void for vagueness as it was originally written, subsequent state court interpretations have provided standards and guides that cure the former constitutional deficiencies. We do not agree. All of the so-called court-created conditions and standards still leave to the jury such broad and unlimited power in imposing costs on acquitted defendants that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is. Pennsylvania decisions have from time to time said expressly, or at least implied, that juries having found a defendant not guilty may impose costs upon him if they find that his conduct, though not unlawful, is "reprehensible in some respect," "improper," outrageous to "morality and justice," or that his conduct was "not reprehensible enough for a criminal conviction but sufficiently reprehensible to deserve an equal distribution of costs" or that though acquitted "his innocence may have been doubtful."[7] In this case the trial judge instructed the jury that it might place the costs of prosecution on the petitioner, though found not guilty of the crime charged, if the jury found that "he has been guilty of some misconduct less than the offense which is charged but nevertheless misconduct of some kind as a result of which he should be required to pay some penalty short of conviction [and] . . . his misconduct has given rise to the prosecution."

It may possibly be that the trial court's charge comes nearer to giving a guide to the court and jury than those that preceded it, but it still falls short of the kind of legal standard due process requires. At best it only

[7] The foregoing quotations appear in a number of Pennsylvania cases including *Commonwealth* v. *Tilghman*, 4 S. & R. 127; *Baldwin* v. *Commonwealth*, 26 Pa. 171; *Commonwealth* v. *Daly*, 11 Pa. Dist. 527 (Q. S. Clearfield); and the opinion of the Superior Court in this case, 202 Pa. Super. 294, 196 A. 2d 189.

told the jury that if they found petitioner guilty of "some misconduct" less than that charged against him, they were authorized by law to saddle him with the State's costs in its unsuccessful prosecution. It would be difficult if not impossible for a person to prepare a defense against such general abstract charges as "misconduct," or "reprehensible conduct." If used in a *statute* which imposed forfeitures, punishments or judgments for costs, such loose and unlimiting terms would certainly cause the statute to fail to measure up to the requirements of the Due Process Clause. And these terms are no more effective to make a statute valid which standing alone is void for vagueness.

We hold that the 1860 Act is constitutionally invalid both as written and as explained by the Pennsylvania courts.[8] The judgment against petitioner is reversed and the case is remanded to the State Supreme Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

[8] In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many states to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1965.

Jay Giaccio, Appellant, *v.* State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.

[January 19, 1966.]

Mr. Justice Stewart, concurring.

I concur in the Court's determination that the Pennsylvania statute here in question cannot be squared with the standards of the Fourteenth Amendment, but for reasons somewhat different from those upon which the Court relies. It seems to me that, despite the Court's disclaimer,* much of the reasoning in its opinion serves to cast grave constitutional doubt upon the settled practice of many States to leave to the unguided discretion of a jury the nature and degree of punishment to be imposed upon a person convicted of a criminal offense. Though I have serious questions about the wisdom of that practice, its constitutionality is quite a different matter. In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law.

*See n. 8, *supra*.

SUPREME COURT OF THE UNITED STATES

No. 47.—October Term, 1965.

Jay Giaccio, Appellant, *v.* State of Pennsylvania.	On Appeal From the Supreme Court of Pennsylvania, Eastern District.

[January 19, 1966.]

Mr. Justice Fortas, concurring.

In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged.